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### The Passive Personality Principle

Geoffrey R. Watson

*The Catholic University of America, Columbus School of Law*

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# ARTICLES

## The Passive Personality Principle

GEOFFREY R. WATSON<sup>†</sup>

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## I. INTRODUCTION

The relationship between state and citizen is a central problem of international law. It is well established that the state can regulate the citizen's conduct even when the citizen is overseas.<sup>1</sup> It is also clear that the state must protect the citizen from human-rights abuse at home,<sup>2</sup> and that the state can afford its citizens diplomatic protection while abroad.<sup>3</sup> But can the state protect its citizen by punishing any crime committed against that citizen by a foreign national in a foreign country? That is, can a state exercise "passive personality jurisdiction"—criminal jurisdiction based solely on the nationality of the victim?

Passive personality jurisdiction is probably the most controversial<sup>4</sup> form of extraterritorial criminal jurisdiction.<sup>5</sup> Many countries, including the United States, have traditionally opposed this theory of jurisdiction. These states have argued that it would be unfair for state A to prosecute a foreign national for a crime committed on foreign soil solely because the victim is a national of state A. They have also suggested that such a prosecution would intrude on the sovereignty of the state in which the

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1. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1986) [hereinafter RESTATEMENT]; Geoffrey R. Watson, *Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction*, 17 YALE J. INT'L L. 41, 70 (1992).

2. See, e.g., U.N. CHARTER, arts. 55-56, reprinted in 3 Bevans 1153 (June 26, 1945) (obliging members to respect human rights for all); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2(1), 999 U.N.T.S. 171 (obliging each state party to ensure the human rights of "all individuals within its territory").

3. See, e.g., EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* § 13, at 25 (1970).

4. See RESTATEMENT, *supra* note 1, § 402 cmt. g (noting that passive personality jurisdiction "has not been generally accepted" for ordinary torts or crimes); Harvard Research on International Law, *Jurisdiction With Respect to Crime*, 29 AM. J. INT'L L. 435, 579 (Supp. 1935) [hereinafter Harvard Research] (asserting that passive personality jurisdiction "has been more strongly contested than any other type of competence.").

5. International law recognizes four other bases of extraterritorial jurisdiction. The territorial-effects principle embraces acts affecting a state's territory, such as illegal immigration. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 300-02 (3d ed. 1979). The nationality principle covers crimes committed by a state's nationals abroad. See Watson, *supra* note 1, at 67-70. The protective principle covers crimes committed abroad that implicate the state's security. See generally Monika B. Krizek, Note, *The Protective Principle of Extraterritorial Jurisdiction: A Brief History and an Application of the Principle to Espionage as an Illustration of Current United States Practice*, 6 B.U. INT'L L.J. 337 (1988). Finally, the universal principle covers crimes so heinous that all states may exercise jurisdiction over them. See Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 839 (1988).

crime occurred and therefore, that this state should exercise its jurisdiction.<sup>6</sup> In recent years, however, some of those same states have argued that passive personality jurisdiction should be invoked to support prosecution of terrorists.<sup>7</sup>

This Article examines the merits of the passive personality principle of criminal jurisdiction, focusing particularly on United States practice. Part II traces the evolution of passive personality jurisdiction in United States law, asserting that passive personality jurisdiction had almost no place in United States law until the 1970s, when Congress began to seek ways to punish terrorist acts against Americans overseas. Part III argues that international law should permit states to exercise passive personality jurisdiction, but only if the defendant is not prosecuted either by the state in which the crime was committed or by the defendant's home state. Part IV considers whether there is a constitutional basis for Congress to enact extraterritorial criminal laws based solely on the passive personality principle. This part also analyzes recent efforts by Congress to expand passive personality jurisdiction beyond terrorist crimes. Finally, part V argues that the debate over passive personality jurisdiction illustrates the need for a more systemic approach to extraterritorial jurisdiction generally.

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6. See, e.g., Letter of Ass't Secretary of State Janet G. Mullins, Dec. 26, 1989 (criticizing passive personality jurisdiction), reprinted in 137 CONG. REC. S4750-52 (daily ed. Apr. 18, 1991) (statements of Sen. Thurmond and Sen. Hollings) [hereinafter Letter of Janet G. Mullins].

States have also objected to the assertion of passive personality jurisdiction over torts and other civil wrongs. See, e.g., Jurisdiction Based on Nationality, 1975 DIGEST § 2, at 339-40 (reporting United States objections to Greece's assertion of jurisdiction over a United States citizen involved in a car accident with a Greek national in the United States); Jurisdiction Based on Nationality, 1973 DIGEST § 2, at 197-98 (reporting United States objections to a similar assertion of jurisdiction by Greece). On the whole, however, the most rancorous disputes over passive personality jurisdiction have involved criminal cases. See, e.g., DEPARTMENT OF STATE, *Report on Extraterritorial Crime and the Cutting Case*, in FOREIGN RELATIONS LAW OF THE UNITED STATES 751-867 (1887) [hereinafter *Report on the Cutting Case*] (discussed *infra* part II). Although this Article does not deal explicitly with application of passive personality jurisdiction in civil cases, most of the Article's analysis may be applied to civil cases. See H.F. VAN PANHUY, *THE ROLE OF NATIONALITY IN INTERNATIONAL LAW* 132 (1959) (noting that passive personality jurisdiction raises similar issues in civil and criminal cases).

7. See RESTATEMENT, *supra* note 1, § 402 cmt. g (noting wider acceptance of passive personality jurisdiction when applied to terrorism).

## II. THE EVOLUTION OF PASSIVE PERSONALITY JURISDICTION IN UNITED STATES PRACTICE

The passive personality principle was not a part of early United States law. In the late eighteenth and early nineteenth centuries, Anglo-American jurisprudence stressed that jurisdiction over crime was essentially territorial.<sup>8</sup> However, early United States authorities did exercise extraterritorial jurisdiction over offenses on board United States-flag vessels on the high seas, and they established certain criminal laws, such as treason, for which jurisdiction was based on nationality or protective principles.<sup>9</sup> But the United States did not establish or exercise jurisdiction founded solely on the nationality of the victim.<sup>10</sup>

In the mid-nineteenth century the United States embarked on a far-reaching program of consular jurisdiction, known as "extraterritoriality," in which United States consular officers exercised exclusive jurisdiction over United States nationals in less developed countries.<sup>11</sup> In general, this exclusive extraterritorial jurisdiction was confined to criminal offenses by Americans, not crimes by foreigners against Americans. For example, the treaty establishing United States extraterritorial rights in China provided that United States nationals accused of "any crime" in China would be tried by a United States consul, whereas Chinese subjects accused of crimes

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8. See Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 883 (1989); Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273, 1276 (1990); JOHN WESTLAKE, *INTERNATIONAL LAW: PART I — PEACE* 252-53 (1910) (noting that the English common law "punished nothing not done in England, thus adopting fully the principle known as the territoriality of crime."). Cf. *Regina v. Keyn*, [1876] 2 Ex. D. 63, 117 (Cr. Cas. Res. 1876) ("[A] foreigner committing an offence of any kind, even against an Englishman, on foreign territory cannot be tried for it in an English Court.").

9. See Watson, *supra* note 1, at 49 (nationality principle describes jurisdiction over persons owing allegiance to the United States; protective principle describes jurisdiction over nationals when protecting the security interests of the state).

10. See, e.g., *United States v. Davis*, 25 F. Cas. 786, 787 (D. Mass. 1837) (No. 14,151) (Story, J.) (dictum) (asserting that the United States would lack jurisdiction over the murder of a United States national by a foreigner on a foreign vessel on the high seas). Occasionally, however, courts suggested in dictum that United States extraterritorial jurisdiction might reach foreign defendants for crimes committed abroad. See, e.g., *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 568 (1840) (Taney, C.J.) (dictum) (suggesting that United States statutes might apply to any fugitive "found" in the United States).

11. See generally SECRETARY OF STATE, *CITIZENSHIP OF THE UNITED STATES, EXPATRIATION, AND PROTECTION ABROAD*, H.R. DOC. NO. 326, 59th Cong., 2d Sess. 197-247 (1906) (describing extraterritoriality).

against United States nationals would be tried by Chinese authorities.<sup>12</sup> Thus, even while the United States exercised exclusive jurisdiction over crimes by its nationals in less developed countries—in effect requiring foreign states to surrender part of their territorial jurisdiction—it declined to assert jurisdiction simply because the victim was a United States national. Apparently United States discomfort with passive personality jurisdiction was strong enough to override the imperialist impulses that spawned consular jurisdiction.

Indeed, the United States expressly rejected another country's exercise of the passive personality principle in 1887, in Cutting's case.<sup>13</sup> In 1886 A.K. Cutting, an American citizen, published an editorial in a Mexican newspaper questioning the character of a Mexican national named Emigdio Medina.<sup>14</sup> At Medina's request Mexico brought charges of criminal libel against Cutting, who settled the matter by agreeing to publish a retraction in the Mexican paper.<sup>15</sup> The retraction, however, turned out to be "microscopic" and "unintelligible."<sup>16</sup> Moreover, Cutting reiterated his derogatory allegations in an editorial in the *El Paso Herald*, a Texas newspaper, the same day the retraction was published in Mexico, and he circulated copies of the *Herald* editorial in Mexico.<sup>17</sup> Mexico thereupon renewed its criminal proceedings against Cutting, and a Mexican court convicted him of criminal libel, holding that publication of the article in Texas was governed by a Mexican law establishing jurisdiction over "[p]enal offenses committed in a foreign country . . . by a foreigner against Mexicans."<sup>18</sup> The court sentenced Cutting to a year of hard labor and imposed a \$600 fine.<sup>19</sup>

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12. Treaty of Peace, Amity and Commerce, July 3, 1844, U.S.-China, art. XXI, 6 Bevans 647, 654. A number of other treaties contained similar provisions. See, e.g., Treaty of Friendship and Commerce, Dec. 13, 1856, U.S.-Persia, art. V, 8 Bevans 1254, 1256; Treaty on Rights of American Citizens in Japan, June 17, 1857, U.S.-Japan, art. IV, 9 Bevans 359, 360; Treaty of Friendship and Commerce, Jan. 17, 1878, U.S.-Samoa, art. IV, 11 Bevans 437, 438.

13. See *Report on the Cutting Case*, *supra* note 6.

14. Cutting, who was "engaged in editing" the Mexican newspaper, criticized Medina's proposal to start a rival newspaper in the same town. *Report on the Cutting Case*, *supra* note 6, at 757. Mexico obtained custody of Cutting because Cutting "declared himself to be . . . a resident of this town [Paso del Norte]." *Id.* at 761 (quoting Mexican district court).

15. *Id.* Mexican law fixed a punishment of up to two years' imprisonment and a fine of up to \$2000 for "defamation" that may cause "dishonor or serious prejudice." *Id.* at 761 n.† (quoting art. 646 of the Mexican Penal Code).

16. *Id.* at 761-62 (reprinting decision of Mexican district court).

17. *Id.* at 762.

18. *Id.* (citing art. 186 of the Mexican Penal Code). The court held in the alternative that Cutting was guilty of violating the conciliation agreement on the original defamation in Mexico because he had not published an adequate retraction and had "ratified" the defamation by renewing it in Texas. *Id.*

19. *Id.* at 764.

The United States vigorously protested the Mexican criminal proceedings. The State Department sent a strongly worded set of instructions to the American minister in Mexico City, asserting that Mexico's exercise of jurisdiction was "wholly inadmissible," and directing the Minister to demand Cutting's immediate release.<sup>20</sup> The Department later elaborated on its rationale, arguing that international law did not permit a state to prosecute a crime simply because the victim was one of its nationals.<sup>21</sup> Such a system, said the Department, would expose people in their own country to a potentially infinite responsibility; each new accretion of foreigners would increase the number of foreign laws that a citizen would be required to obey while in her own country.<sup>22</sup> Mexico's exercise of jurisdiction also prompted criticism from the White House.<sup>23</sup> In the face of these protests, Medina withdrew his criminal complaint.<sup>24</sup> No doubt the Mexican government encouraged him to do so to avoid further friction.

Although the Cutting case reflects United States hostility toward passive personality jurisdiction, other aspects of the case probably contributed to the United States response. To United States officials, the punishment hardly fit the crime. Defamation was punished lightly in the United States, if at all.<sup>25</sup> The State Department stressed that the case implicated freedom of speech and that Mexican authorities had treated Cutting harshly in jail.<sup>26</sup> One might ask whether the United States would have protested Mexico's assertion of jurisdiction so loudly had Cutting been accused of mass murder of Mexican nationals in Texas.

Moreover, Mexico's assertion of jurisdiction does not seem to have been grounded solely on the nationality of the "victim," Medina. The Mexican court noted that Cutting had initially published a libel in Mexico, had agreed to retract it but failed to do so adequately, and had circulated the Texas editorial in Mexico.<sup>27</sup> In an alternative holding, the court seemed to indicate that it could exercise territorial jurisdiction over any of these acts without invoking the passive personality principle.<sup>28</sup> Because it does appear that some of these acts justified an exercise of territorial jurisdiction, the Mexican court may have needlessly enraged the United

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20. *Id.* at 759.

21. *Id.* at 813.

22. *Id.* at 840.

23. *Id.* at 839.

24. *Id.* at 767.

25. *See id.* at 758 (referring to the crime as a misdemeanor).

26. *Id.*

27. *Id.* at 761-62.

28. *See id.* at 762 (noting that failure to fulfill the conciliation agreement carried the same responsibility as the libel offense itself).

States by asserting jurisdiction due to the publication of an article in Texas, and not simply exercising jurisdiction over the acts in Mexico.

In any event, the views expressed by the United States in the Cutting case remained the United States position for almost one hundred years.<sup>29</sup> Most other states also remained suspicious of passive personality jurisdiction in the twentieth century. Some states established passive personality jurisdiction but few exercised it, and those that did sometimes encountered strong opposition from other states. In 1926, for example, Turkey brought manslaughter charges against the French first officer of the *Lotus*, a French vessel that had collided with a Turkish vessel on the high seas, killing eight Turkish nationals.<sup>30</sup> Turkey based its jurisdiction on a Turkish statute providing for jurisdiction over "[a]ny foreigner who . . . commits an offence abroad to the prejudice of Turkey or of a Turkish subject."<sup>31</sup> France vigorously objected to Turkey's assertion of jurisdiction, and the two states referred the matter to the Permanent Court of International Justice for a resolution.

A bare majority of the Permanent Court held that Turkey could exercise jurisdiction over the French first officer.<sup>32</sup> The Court began by stressing that the "result of the collision"—the death of eight Turkish sailors and passengers—was "a factor essential for the institution of the criminal proceedings in question."<sup>33</sup> Next, the Court held that international law rests entirely on the positive acts of states, and that France must identify a relevant "rule of international law limiting the freedom of States to extend the criminal jurisdiction of their courts."<sup>34</sup> The Court found no such prohibition, holding that Turkey's assertion of jurisdiction was justified as an exercise of territorial or territorial-effects jurisdiction because the collision had damaging effects on a floating bit of Turkish territory.<sup>35</sup> The Court did not decide whether Turkey's prosecution might also be

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29. See *infra* notes 48–75 and accompanying text.

30. The S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 13 (Sept. 7).

31. *Id.* at 14–15 quoting art. 6 of the Turkish Penal Code (emphasis added).

32. *Id.* at 32.

33. *Id.* at 13.

34. *Id.* at 18–21. This aspect of the Court's opinion has fueled the ongoing debate over whether international law grows out of the "natural rights" of states or whether it derives solely from the "consent" of states. See, e.g., J.L. BRIERLY, *THE LAW OF NATIONS* 49–56 (6th ed. 1963) (rejecting both contentions); Edward M. Morgan, *Criminal Process, International Law, and Extraterritorial Crime*, 38 U. TORONTO L.J. 245, 249–50 (1988) (arguing that the decision reflects the libertarianism that characterizes modern international relations).

35. The S.S. "Lotus", *supra* note 30, at 23.



justified by the nationality of the victims, even though the Turkish statute itself established jurisdiction largely on this basis.<sup>36</sup>

The dissenting judges criticized the Court's failure to consider the validity of passive personality jurisdiction. They argued that Turkey sought to exercise jurisdiction primarily on that basis, not on a territorial-effects theory, and that customary international law prohibited the exercise of such jurisdiction.<sup>37</sup> The dissent's view was later vindicated, at least in part, when the Convention on the High Seas of 1958 overruled the narrow holding of *Lotus* by providing that only the flag state or the responsible officer's home state could prosecute the officer for collisions or other incidents of navigation on the high seas.<sup>38</sup>

Eight years after *Lotus*, a group of Harvard faculty and students, known collectively as the Harvard Research on International Law, published an influential study on international law.<sup>39</sup> The study included a draft convention on jurisdiction that omitted passive personality because it is "the most difficult [principle] to justify in theory," and because its inclusion "would only invite controversy without serving any useful objective."<sup>40</sup> The draft convention nonetheless did permit states to exercise "universal" jurisdiction over aliens who commit crimes against their nationals outside the territory of any state,<sup>41</sup> all the while insisting that this form of jurisdiction was not passive personality jurisdiction.<sup>42</sup> Finally, the study appears to have adopted for standard use the term "passive personality" jurisdiction, which was to be distinguished from "active personality" jurisdiction, or jurisdiction based on the nationality of the offender.<sup>43</sup>

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36. *Id.* at 22–23. The opinion has nonetheless been construed as approving passive personality jurisdiction. Cf. Jon C. Cowen, Note, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Faulty Drafting May Defeat Efforts to Bring Terrorists to Justice*, 21 CORNELL J. INT'L L. 127, 143–44 (1988) (noting that lack of an international consensus on passive personality principle legitimacy will hinder extradition).

37. The S.S. "*Lotus*", *supra* note 30, at 34 (MM. Loder dissenting).

38. See Convention on the High Seas, April 29, 1958, art. 11, 13 U.S.T. 2313, 450 U.N.T.S. 82.

39. See Harvard Research, *supra* note 4.

40. *Id.* at 579. The study noted that many states continued to reject passive personality jurisdiction. *Id.*

41. See *id.* at 573 (excerpting art. 10(c) of draft convention).

42. *Id.* at 589 (reaffirming that the Article was based on the universality principle, not the passive personality principle).

43. See *id.* at 578 (noting support in the practice of other states who call the jurisdiction "passive personality, *personalité passive*, *Schutzprinzip*"); Christopher Blakesley, *A Conceptual Framework for Extraterritorial Jurisdiction Over Extraterritorial Crime*, 1984 UTAH L. REV. 685, 687 & n.7 (noting wide acceptance of Harvard Research terminology).

Until recently United States policy on passive personality jurisdiction reflected the skepticism expressed in the Harvard Research. The first Restatement of Foreign Relations Law of the United States confidently took the position that customary international law did not permit the exercise of passive personality jurisdiction.<sup>44</sup> The Second Restatement reiterated this view in the 1960s.<sup>45</sup> During the 1970s United States representatives spoke against passive personality jurisdiction, objecting to Greek attempts to take civil jurisdiction over United States nationals who injured Greek nationals in car accidents occurring in the United States.<sup>46</sup> As late as 1989, the United States took the same position in a case involving the murder of a United States national in Korea.<sup>47</sup>

Despite these statements, passive personality jurisdiction began to creep into United States law in the early 1970s when the United States entered into a series of multilateral terrorism conventions, sometimes founded on passive personality jurisdiction, that obliged states to extradite or prosecute offenders for various terrorist offenses. In 1973, for example, the United States signed the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents,<sup>48</sup> which obliged and authorized states to exercise jurisdiction over crimes against their diplomats and other agents abroad. Pursuant to the Convention, the United States established laws penalizing crimes against American officials and diplomats abroad.<sup>49</sup> These statutes, however, can be understood as examples of the protective principle of jurisdiction rather than the passive personality principle because they protect senior officials of the government, and thus, arguably, the security of the state.

Even if the Internationally Protected Persons Convention can be explained as an exercise of protective jurisdiction, United States adherence to the International Convention Against the Taking of Hostages<sup>50</sup> seems

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It is perhaps a tribute to the power of alliteration that the term "passive personality" now enjoys broad acceptance but the term "active personality" does not. The latter has yielded to the term "nationality jurisdiction." Cf. RESTATEMENT, *supra* note 1, § 402 cmt. g (describing "passive personality jurisdiction") with § 402 cmt. b (describing "nationality jurisdiction").

44. RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 25 (1949).

45. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 30(2) (1965).

46. See Jurisdiction Based on Nationality, 1975 DIGEST § 2, *supra* note 6; Jurisdiction Based on Nationality, 1973 DIGEST § 2, *supra* note 6.

47. See Letter of Janet G. Mullins, *supra* note 6 (criticizing passive personality jurisdiction).

48. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

49. See, e.g., 18 U.S.C. §§ 1114, 1117 (1988).

50. International Convention Against the Taking of Hostages, Dec. 17, 1979, 18 I.L.M. 1456 (1979).

close to actually embracing passive personality jurisdiction. The Convention calls on states to establish extraterritorial jurisdiction over terrorist crimes committed by and, if "appropriate," against their nationals.<sup>51</sup> The United States implemented the convention by adopting the Hostage Taking Act,<sup>52</sup> which authorized the Justice Department to prosecute terrorist crimes "by or against" United States nationals abroad.<sup>53</sup> Unlike the statutes implementing the Internationally Protected Persons Convention, the Hostage Taking Act extended to terrorist crimes against any United States national, not just United States officials, and thus seems closer to passive personality jurisdiction.<sup>54</sup> A fair case can be made, though, that the act is designed not simply to protect American citizens from hostage-taking, but also to protect national security from coercion by terrorists. In other words, the Hostage Taking Act may fit under the protective principle as well as the passive personality principle because the security of the state, not just individuals, is at stake.

During the 1980s the United States continued to inch toward passive personality jurisdiction over terrorist crimes. Following the Achille Lauro incident in 1985, which caused the death of an American passenger named Leon Klinghoffer,<sup>55</sup> Congress extended the reach of the terrorism laws, establishing jurisdiction over any violent crime committed against an American so long as the crime was intended to coerce a "government or civilian population."<sup>56</sup> In 1986, the authors of the Third Restatement acknowledged that while passive personality remained controversial, it had won some acceptance as a basis for prosecuting terrorists.<sup>57</sup>

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51. *Id.* art. 5(1)(d).

52. 18 U.S.C. § 1203 (1988).

53. *Id.*

54. Some commentators have taken this position. See, e.g., Andreas Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AM. J. INT'L L. 880, 886-88 (1989); Lynda M. Clarizio, Comment, *United States v. Yunis*, 83 AM. J. INT'L L. 94, 99 (1989) (arguing that the Hostage Taking Act adopts both passive personality and universality principles).

55. *U.S. Drops a Warrant in '85 Ship Hijacking*, N.Y. TIMES, Jan. 18, 1988, at A5.

56. 18 U.S.C. § 2331 (1988). The bill's authors have insisted that it rests on the protective principle, not the passive personality principle. See 132 CONG. REC. S1382-87 (daily ed. Feb. 19, 1986) (remarks of Sen. Specter). A number of commentators agree. See Christopher Blakesley, *Jurisdiction as Legal Protection Against Terrorism*, 19 CONN. L. REV. 895, 942 (1987); Patrick Donnelly, Note, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599, 611, 613 (1987); but see Jeannemarie Gardes, Note, *Exercising Extraterritorial Jurisdiction over Terrorists*, 18 U.S.C. § 7 and 18 U.S.C. § 2331, 10 CRIM. JUS. J. 307, 333-34 (1988). Inescapably, however, criminal liability under the Act may turn solely on the nationality of the victim, suggesting that it contains at least an element of passive personality jurisdiction.

57. RESTATEMENT, *supra* note 1, § 402 cmt. g.

The United States has not used its new terrorism statutes often. In 1986 the Justice Department indicted the mastermind of the Achille Lauro hijacking, Mohammed Abbas, but the United States dropped the indictment after Italy convicted the suspect *in absentia*.<sup>58</sup> More recently, the United States successfully prosecuted a Lebanese national named Fawaz Yunis for his role in hijacking a Jordanian airliner carrying, among others, three American citizens. A federal district court upheld the prosecution as a valid exercise of both universal and passive personality jurisdiction.<sup>59</sup> Although this exercise of passive personality jurisdiction resembles the exercise of protective jurisdiction, the federal district court in *Yunis* specifically declined to rely on protective jurisdiction.<sup>60</sup> Affirming Yunis' conviction, the D.C. Circuit asserted that customary international law did not bar this exercise of jurisdiction.<sup>61</sup> The court held, however, that the congressional statute authorizing prosecution was valid whether or not it violated customary international law, noting that United States courts enforce United States statutes that clearly supersede prior inconsistent customary international law.<sup>62</sup> The prosecution of Yunis and the indictment of Abbas certainly suggest that the United States has begun to accept the passive personality principle, if only as applied to terrorist crimes.

Outside of terrorism, however, the United States still seems reluctant to embrace passive personality jurisdiction. Although Congress has recognized passive personality jurisdiction for some terrorist offenses, it has not extended such jurisdiction to common crimes of violence against Americans on foreign soil.<sup>63</sup> In 1989 the Executive Branch, speaking through the State Department, reiterated its long-standing opposition to passive personality jurisdiction.<sup>64</sup> Apart from the *Yunis* case, the Judiciary has not had much occasion to pass on its validity. A number of courts however have expressed approval of passive personality jurisdiction even though another basis of jurisdiction, usually protective, was more apt.

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58. *U.S. Drops a Warrant in '85 Ship Hijacking*, *supra* note 55, at A5.

59. *See* United States v. Yunis, 681 F. Supp. 896, 903 (D.D.C. 1988), *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991).

60. 681 F. Supp. at 903 n.14.

61. United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (citing the district court's reliance on the passive personality and protective principles). This holding may have been dictum, since the court also concluded that a rule of customary international law prohibiting passive personality jurisdiction would yield to a later-enacted statute establishing the jurisdiction. *Id.*

62. *Id.* *Cf.* The Paquete Habana, 175 U.S. 677, 700 (1900) (customary international law is controlling "where there is no treaty, and no controlling executive or legislative act").

63. *See* 18 U.S.C. § 7(7) (1988) (crimes outside jurisdiction of any nation); S. 1241, § 3203, 102d Cong., 1st Sess. (1991) (unenacted proposal to extend jurisdiction to murders of Americans abroad).

64. *See* Letter of Janet G. Mullins, *supra* note 6.

These cases mostly relate to United States prosecutions of foreigners for crimes against DEA agents and other United States officials<sup>65</sup> or extradition of fugitives to foreign states for similar crimes.<sup>66</sup>

At least one United States judicial opinion reflects hostility to passive personality jurisdiction. In *United States v. Columba-Colella*<sup>67</sup> the Fifth Circuit dismissed the indictment of a Mexican national accused of knowingly receiving in Mexico a car stolen from a United States national. The court flatly acknowledged that "[t]here is no question . . . that Columba-Colella's conduct somehow affected a United States citizen," because if successful "he would have prevented the stolen car from finding its way back to its owner."<sup>68</sup> The court nonetheless held that Congress did not intend to assert jurisdiction over this conduct under 18 U.S.C. § 2313 (which criminalizes the receipt of stolen goods in foreign commerce) because Congress lacked the "competence" to do so.<sup>69</sup> The court added:

It is difficult to distinguish the present case from one in which the defendant had attempted not to fence a stolen car but instead to pick the pockets of American tourists in Acapulco. No one would argue either that Congress would be competent to prohibit such conduct or that the courts of the United States would have jurisdiction to enforce such a prohibition were the offender in their control. Indeed, Congress would not be competent to attach criminal sanctions to the murder of an American by a foreign national in a foreign country, even if the victim returned home and succumbed to his injuries.<sup>70</sup>

Nonetheless, there are signs that the United States, or at least Congress, is moving toward passive personality jurisdiction outside the realm of

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65. See, e.g., *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1205-06 (9th Cir. 1991) (holding that passive personality and other jurisdictional principles "cumulatively" justified prosecution of foreign national for crime against DEA agent); *United States v. Benitez*, 741 F.2d 1312, 1316 (11th Cir. 1984) (holding that protective and passive personality principles supported prosecution of foreign national for crime against DEA agent).

66. See *Ahmad v. Wigen*, 726 F. Supp. 389, 398 (E.D.N.Y. 1989) (noting that the requesting state based jurisdiction on protective and passive personality principles).

67. 604 F.2d 356 (5th Cir. 1979).

68. *Id.* at 360.

69. *Id.*

70. *Id.* (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 18, 30(2) (1965)).

One other court, citing *Columba-Colella*, declined to pass judgment on passive personality jurisdiction, noting that other jurisdictional bases justified the prosecution at issue. *United States v. Layton*, 509 F. Supp. 212, 216 n.5 (N.D. Cal. 1981) (murder of Congressman in Guyana). *Columba-Colella* is discussed in more detail *infra* part V.

terrorism. In 1987 Congress expanded United States jurisdiction to include crimes against Americans "outside the jurisdiction of any nation"—that is, on the high seas or in Antarctica.<sup>71</sup> In 1991, following the unprosecuted murder of a United States national in Korea,<sup>72</sup> both houses of Congress passed legislation that would have established jurisdiction over murders of United States nationals on foreign soil.<sup>73</sup> Although Congress shelved the legislation, which was part of the Omnibus Crime Bill, at the end of the session because the White House opposed provisions unrelated to the passive personality proposal,<sup>74</sup> the proposal will almost certainly rise again.<sup>75</sup>

International practice has mirrored that of the United States. The international community has not, by and large, accepted passive personality jurisdiction except as applied to terrorism—and that form of jurisdiction may resemble protective or even universal jurisdiction more than passive personality jurisdiction. To be sure, some states have enacted statutes establishing extraterritorial jurisdiction over common crimes against their nationals.<sup>76</sup> But few states have actually exercised such jurisdiction, deferring instead to the state in which the crime occurred. France, for example, has established jurisdiction over serious crimes against its nationals but has generally declined to exercise it.<sup>77</sup> It seems doubtful that this limited amount of state practice amounts to a rule of customary inter-

71. See 18 U.S.C. § 7(7) (1988).

72. See *Oregonian Returns Home After Five Months in Korean Prison*, UPI, Jan. 1, 1990, available in LEXIS, Nexis Library, Wires File.

73. See S. 1241, 102d Cong., 1st Sess. (1991); H.R. 3371, 102d Cong., 1st Sess. (1991).

74. See Guy Gugliotta, *Senate GOP Stalling Defeats Crime Bill; House Passed Measure Bush Called Too Soft*, WASH. POST, Nov. 28, 1991, at A41 (describing a successful Republican filibuster).

75. The bill apparently had little chance of passing the 102d session of Congress, however. See *Republicans' Filibuster in Senate Kills Chances for Anti-Crime Bill*, N.Y. TIMES, March 20, 1992, at A20 (describing the effect of election-year politics on the crime bill).

76. See, e.g., Code de procédure pénale, art. 689-1 (France), reprinted in FRENCH LAW 9-122 (George A. Bermann, Henry P. deVries & Nina M. Galston eds., 1990); Penal Code of the Federal Republic of Germany, § 7, in 28 THE AMERICAN SERIES OF FOREIGN PENAL CODES 50 (Joseph J. Darby trans., 1987) [hereinafter PENAL CODES]; G. LEROY CERTOMA, THE ITALIAN LEGAL SYSTEM 90-91 (1985) (citing Italian Penal Code provisions); Greek Penal Code, art. 7(1), in 18 PENAL CODES at 39 (Nicholas B. Lolis trans., 1973); Austrian Penal Act, § 40, in 12 PENAL CODES 31-32 (Norbert D. West & Samuel I. Shuman trans., 1966); Turkish Criminal Code, art. 6, in 9 PENAL CODES at 14 (Orhan Sepici & Mustafa Ovacik trans., 1965).

Many other states, however, continue to reject the passive personality principle. See, e.g., Criminal Code of Canada, R.S.C., ch. C-46, § 6(2) (1993) (no jurisdiction for crimes committed outside Canada); 18 U.S.C. § 7(7) (1988) (claiming territorial jurisdiction only when the offense occurs outside the jurisdiction of any nation); see also RESTATEMENT, *supra* note 1, § 402 cmt. g (noting that passive personality has not gained wide acceptance for ordinary crimes).

77. See Blakesley, *supra* note 56, at 938.

national law endorsing passive personality jurisdiction. On the other hand, it seems equally doubtful that state practice has generated a rule of customary international law *barring* passive personality jurisdiction.<sup>78</sup>

In sum, passive personality jurisdiction has not yet become a significant part of either United States or international law, except that it has won some acceptance as a means of prosecuting terrorists. The next part of this Article considers whether customary international law should recognize some form of passive personality jurisdiction, and, if so, to what extent. Part IV asks whether passive personality jurisdiction could be incorporated into United States law.

### III. PASSIVE PERSONALITY JURISDICTION IN INTERNATIONAL LAW

The passive personality principle has traditionally been criticized for at least three reasons. First, passive personality jurisdiction is thought to intrude too deeply on the sovereignty of other states, such as the state in which the crime occurred or the offender's home state, both of which arguably have a more direct connection to the crime than the victim's home state.<sup>79</sup> Second, passive personality has been criticized on the grounds that it deprives potential defendants of notice that their conduct is criminal, since the applicable rule of criminal law will depend on the victim's nationality.<sup>80</sup> Under this view, it is unfair to subject a defendant to the substantive criminal law of the victim's home state, since no one can be presumed to know the criminal law of a state thousands of miles away. Third, critics of passive personality jurisdiction argue that it is impractical. They point out that many extradition treaties will not permit rendition of a fugitive to the victim's home state, and, in any event, that the victim's home state will be unable to prosecute for lack of fresh evidence and

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78. See discussion *infra* part V.

79. See, e.g., Letter of Janet G. Mullins, *supra* note 6 (arguing that passive personality jurisdiction "interferes unduly with the application of local law by local authorities"); *Report on The Cutting Case*, *supra* note 6, at 824 (arguing that the exercise of passive personality jurisdiction would be "a work of supererogation" and that it might "interfer[e] in a matter which, as the law of the place provided for it, would most properly be left alone.").

80. See, e.g., *Report on the Cutting Case*, *supra* note 6, at 840 (arguing that passive personality jurisdiction is unfair because it exposes individuals to an "indefinite responsibility").

witnesses.<sup>81</sup> This part of the Article takes up each of these contentions in turn.

### A. *Intrusion on Sovereignty*

States have traditionally regarded territorial jurisdiction as the most important head of jurisdiction. A state may freely regulate the conduct of individuals within its own borders, subject only to the limits of international human rights law.<sup>82</sup> In a sense, then, any attempt by another state to exercise jurisdiction over persons within a state's borders could be perceived as an intrusion on sovereignty, since such an attempt may interfere with the state's exercise of its own jurisdiction.<sup>83</sup> States are particularly likely to view an exercise of extraterritorial jurisdiction as "intrusive" if the conduct in question is not criminal in the state in which it occurred.<sup>84</sup>

Nationality jurisdiction, for example, is a generally accepted basis for prosecution,<sup>85</sup> but not when the conduct is not criminal in the state in which it occurred. Thus came the outcry over Ireland's attempt to apply its own laws criminalizing abortion to an Irish national seeking an abortion in England.<sup>86</sup> To be sure, states might acquiesce in a nationality-based extraterritorial prosecution for conduct generally recognized as criminal—murder or rape, for example—even if the host state failed to criminalize that conduct. Indeed, there is a trend away from making "dual criminality" a prerequisite to international judicial assistance in criminal

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81. See, e.g., Cowen, *supra* note 36, at 143–44 (arguing that antiterrorism statutes founded on passive personality jurisdiction will encounter extradition problems); cf. Blakesley, *supra* note 43 at 739, 744–45 (arguing that dual criminality requirement in extradition extends to jurisdiction).

82. See Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273, 1276 (1990).

83. See RESTATEMENT, *supra* note 1, § 403, reporters' note 8, ("the exercise of criminal . . . jurisdiction in relation to acts committed in another state may be perceived as particularly intrusive.") (citing *Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp.*, 1978 App.Cas. 547, 630).

84. See 2 INTERNATIONAL CRIMINAL LAW 15 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) (discussing offenses against a state committed outside its boundaries); cf. Treaty of Extradition, June 8, 1972, U.S.–U.K., art. III(1)(a), 28 U.S.T. 227, 229 (requiring "double criminality" for extradition).

85. See RESTATEMENT, *supra* note 1, § 402(2).

86. William E. Schmidt, *Girl, 14, Raped and Pregnant, Is Caught in Web of Irish Law*, N.Y. TIMES, Feb. 18, 1992, at A1. The Irish Supreme Court eventually ruled that the fourteen-year-old could travel to England for the abortion without fear of Irish prosecution. James F. Clarity, *Irish High Court Explains Decision*, N.Y. TIMES, Mar. 6, 1992, at A8 (noting that "the high court feared she would kill herself if they refused").



matters.<sup>87</sup> In general, however, "dual criminality" remains an essential element of international extradition,<sup>88</sup> and it is likely to remain important in assessing the propriety of extraterritorial jurisdiction.

Like nationality jurisdiction, passive personality jurisdiction will usually be viewed as intrusive when dual criminality is lacking. If State *X* seeks to prosecute a national of State *Y* for committing a crime against a national of *X* in the territory of *Y*, and the conduct is not criminal in State *Y*, then *Y*'s national will be punished for conduct that would normally be lawful in *Y*'s home state. State *Y* is likely to regard such a prosecution as undermining its own criminal justice system and as blurring the accepted standards of conduct within State *Y*. State *X* would essentially ask State *Y* to acquiesce in a prosecution of *Y*'s national for conduct in *Y*'s territory—blasphemy, for example—that might seem trivial or even constitutionally protected to *Y*. Most states would probably deem this result unacceptable. Therefore, it seems unlikely that the international legal system will ever approve of passive personality jurisdiction unless there is at least some element of "dual criminality" built into it.

A much more difficult question is whether international law might accept passive personality jurisdiction that is conditioned on dual criminality. Some states have already adopted this form of the jurisdiction.<sup>89</sup> Moreover, states have long accepted that some forms of extraterritorial jurisdiction do not intrude on sovereignty, or at least not to an intolerable extent.<sup>90</sup>

Nonetheless, many states apparently consider passive personality jurisdiction to be more intrusive than nationality or territorial jurisdiction, even if exercised when the conduct is criminal in the state in which the crime occurred.<sup>91</sup> This view of "intrusiveness" seems to turn on states' assessments of the interests served by a particular exercise of extraterritorial jurisdiction. The international community has perceived that a state has a

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87. See, e.g., SENATE COMM. ON FOREIGN RELATIONS, MUTUAL LEGAL ASSISTANCE COOPERATION TREATY WITH MEXICO, S. EXEC. REP. NO. 9, 101st Cong., 1st Sess. 11-12 (1989) (noting that U.S.-Mexico MLAT does not contain dual-criminality requirement); SENATE COMM. ON FOREIGN RELATIONS, TREATY WITH CANADA ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, S. EXEC. REP. NO. 10, 101st Cong., 1st Sess. 13 (1989) (similar).

88. See, e.g., Treaty of Extradition, June 8, 1972, U.S.-U.K., art. III(1)(a) 28 U.S.T. 227, 229.

89. See, e.g., Norwegian Penal Law, § 12(4)(a)-(b), in 3 PENAL CODES, *supra* note 76, at 16 (Haraold Schjoldager and Finn Backer trans., 1961); Polish Penal Code, art. 114, § 1, in 19 PENAL CODES, *supra* note 76, at 33, 63 (William S. Kenney & Tadeusz Sadowski trans., 1973).

90. See generally RESTATEMENT, *supra* note 1, § 402 (describing the different bases of extraterritorial jurisdiction).

91. See, e.g., Letter of Janet G. Mullins, *supra* note 6 (criticizing proposal to establish passive personality jurisdiction over serious common crimes that are punishable in virtually all states).

more valid interest in regulating the conduct of its nationals than in regulating foreigners who harm its nationals abroad, and thus has viewed passive personality jurisdiction as a less compelling basis than nationality. And the international community often puts the interests of the state in which the crime occurred ahead of either the state of the offender or the state of the victim,<sup>92</sup> apparently on the grounds that the host state's interest in preserving order at home outweighs the interests of either the victim's or offender's home state in regulating conduct abroad.

Territorial jurisdiction usually serves stronger state interests than passive personality jurisdiction. Regulation of criminal conduct within a state's own territory is obviously crucial to the maintenance of order within that state. It has been argued, however, that this interest in social order is also served by passive personality and other forms of extraterritorial jurisdiction. "If disturbance of the legal order within a State's territory is considered the most persuasive reason for penal jurisdiction, such disturbance may be found in the presence unpunished of an offender who has committed crime elsewhere."<sup>93</sup> But even if a state does have some "social-order" interest in prosecuting an offender found in its territory for a crime committed elsewhere, it obviously has a stronger interest in prosecuting such an offender for a crime committed inside the state's own territory.

Nationality jurisdiction also serves significant state interests. Nationality jurisdiction does little to maintain order at home, except insofar as vigorous enforcement of a state's criminal laws abroad has an incidental deterrent effect at home. Rather, nationality-based criminal jurisdiction reflects the need to maintain good relations with other states—both by deterring conduct by its own nationals that reflects poorly on the state abroad, and by ensuring that nationals do not go unpunished in the event that they escape prosecution by the state in which they commit a crime. A state's national might escape prosecution by fleeing home and thwarting extradition, or the national might be a diplomat entitled to immunity from the receiving state's criminal laws. That national's home state can protect its reputation and its relations with other states by exercising nationality-based criminal jurisdiction itself. In at least some cases, then, nationality jurisdiction might serve another important state interest: the smooth operation of its foreign relations.<sup>94</sup>

When resolving jurisdictional disputes, states sometimes put nationality jurisdiction on a par with territorial jurisdiction. In some cases, the

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92. See *infra* notes 128–32 and accompanying text.

93. Harvard Research, *supra* note 4, at 580.

94. See generally Watson, *supra* note 1, at 44–52.

offender's home state will exercise jurisdiction even though the state in which the crime occurred is also willing to prosecute. This occurs most frequently when the state in which the crime occurred requests extradition of the offender from the offender's home state. Many bilateral extradition treaties provide that the requested state is not required to extradite its own nationals,<sup>95</sup> and in many circumstances the requested state has enacted into municipal law nationality-based criminal jurisdiction.<sup>96</sup> On the other hand, many states do regard the requesting state's interest as paramount, and they insist that states extradite their own nationals rather than exercise nationality-based criminal jurisdiction. Such requesting states consider regulation of conduct within its own borders home more important than regulation of a state's nationals abroad.<sup>97</sup>

Passive personality jurisdiction does not clearly serve any of the interests furthered by territorial or nationality jurisdiction. Unlike territorial jurisdiction, it does little to promote social order at home, except insofar as vigorous enforcement of a state's laws abroad has a marginally deterrent effect at home. Unlike nationality jurisdiction, it does not promote better foreign relations by taking responsibility for the misdeeds of a state's nationals abroad.

Passive personality does, however, further a third important state interest: the protection of a state's nationals abroad. By deterring crime against a state's nationals abroad, passive personality jurisdiction presumably protects them from physical and economic harm. Protection of a state's nationals abroad, while perhaps not as fundamental as the maintenance of social order or peaceful foreign relations, is a legitimate interest of that state.<sup>98</sup> Virtually every state in the world provides consular services to its nationals abroad. Consuls are designed to ensure that a state's nationals are not physically mistreated while abroad, discrim-

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95. See, e.g., Treaty of Extradition, Oct. 29, 1883, U.S.-Lux., 23 Stat. 808. Many civil-law states refuse to extradite their nationals, opting instead to prosecute them for crimes committed overseas. See, e.g., INTERNATIONAL LAW: CASES AND MATERIALS 836 (Louis Henkin, Richard C. Pugh, Oscar Schacter & Hans Smit eds., 2d ed. 1986) (citing examples from French and German law); SATYA DEVA BEDI, EXTRADITION IN INTERNATIONAL LAW AND PRACTICE 94 (1968).

96. See, e.g., Extradition Act of 1988, 1 AUSTL. ACTS P. No. 4, § 45 (1988).

97. The United States, for example, has consistently called for states to extradite their own nationals. See, e.g., JOHN B. MOORE, 1 A TREATISE ON EXTRADITION AND INTERSTATE RENDITION § 140, at 174 n.2 (1891) (describing United States diplomatic efforts to persuade Switzerland to agree to extradition of its nationals). See generally ROBERT W. RAFUSE, THE EXTRADITION OF NATIONALS, reprinted in 24 ILLINOIS STUDIES IN THE SOCIAL SCIENCES No. 2 (1939).

98. See BORCHARD, *supra* note 3, § 13, at 25.

inated against in trade or employment, or abused in foreign prisons. Many of these services (prison visitation, for example) are mandated by treaty.<sup>99</sup>

It might be argued, however, that states have little valid interest in passive personality jurisdiction because it will have scant deterrent effect. An individual contemplating a crime may have no idea of the nationality of his victim, and hence no idea of what criminal law might attach to his conduct. Even if the offender does know his victim's nationality, he may not be familiar with the law of the victim's home state. Indeed, the offender is much more likely to be familiar with the law of his own home state, or perhaps the law of the state in which the crime occurs, than with the law of the *victim's* home state. In addition, the state in which the crime occurred is much more likely to prosecute than the victim's home state, even if passive personality jurisdiction becomes widely accepted. Thus the deterrent effect of prosecutions by the victim's home state will be diluted even further.

Still, passive personality's uncertain deterrent effect protects nationals better than no deterrent at all. That it serves a valid interest imperfectly is not in itself fatal. Territorial jurisdiction obviously does not deter perfectly. Also, while nationality jurisdiction may promote good foreign relations in some cases, it may injure them in others, as when the state in which the crime occurred wishes to prosecute. Moreover, the very uncertainty of the passive personality remedy may enhance its deterrent effect. If a potential offender is unsure of his victim's nationality, and if he is generally aware that harming some foreigners carries grave penalties, he may choose not to take that risk that he is wrong about the identity of the victim. Even if he knows his victim's nationality, he may be only vaguely aware that crimes against some foreigners are harshly punished by their home states. Again, his uncertainty may persuade him to choose another, less risky target.

Passive personality jurisdiction, then, serves an important state interest—protection of its own nationals abroad—and does so with at least some efficacy. It is difficult to see, then, why nationality jurisdiction is not considered “intrusive” but passive personality jurisdiction is. In both cases, a state furthers its legitimate interests by applying its own law to conduct in another state's territory. It is far from clear that a state has a stronger interest in exercising nationality jurisdiction than passive personality jurisdiction. Nationality jurisdiction may occasionally enhance the reputation of a state by ensuring that its nationals do not literally get away with murder on foreign soil, just as passive personality may occasionally deter a terrorist or violent criminal from targeting a national of a particular

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99. See Vienna Convention on Consular Relations, Apr. 24, 1963, art. 36(1)(c), 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292 (providing for prison visitation).

state. But even if nationality jurisdiction serves more fundamental interests, passive personality clearly serves valid interests as well.

The traditional preference for nationality jurisdiction may also reflect a sense that states should proceed more cautiously when seeking to prosecute foreigners. But this objection does not explain why other forms of jurisdiction over aliens—protective jurisdiction, territorial-effects jurisdiction, and universal jurisdiction—are acceptable while passive personality jurisdiction is not. If the United States can prosecute two British nationals for conspiring in London to import marijuana into the United States, it should also be able to prosecute a British national for murdering a United States citizen in London—though in both cases the English authorities should have the first crack at prosecution. If in either case the English do prosecute, treaty law would bar the extradition of the offender to the United States for retrial on the same offenses.<sup>100</sup>

One last question is whether passive personality jurisdiction “intrudes” on the sovereignty of the *offender’s* home state. The offender, after all, may not be a national of the state in which the crime occurred. Again, this question may turn largely on whether the offender’s home state wishes to prosecute at all. If not, it is again difficult to see how passive personality jurisdiction “intrudes” on that state’s sovereignty. Prosecution by the victim’s home state in such circumstances hardly seems likely to undermine the criminal justice system of the offender’s home state.

If, on the other hand, the offender’s home state does wish to prosecute, then the victim’s home state has a much weaker case indeed. The respective state interests may be roughly equivalent. The offender’s home state has a valid interest in deterring acts by its nationals that damage its reputation abroad, and perhaps in demonstrating to the state in which the crime occurred that it will take responsibility for the misconduct of its nationals abroad; the victim’s home state, for its part, has a valid interest in protecting its nationals.<sup>101</sup> But it is probably more fair to the defendant to give preference to the defendant’s home state, for the defendant can be presumed to be aware of his own country’s law—or at least can be presumed to be more familiar with his own country’s law than with the law of the victim’s state.<sup>102</sup>

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100. See Treaty of Extradition, June 8, 1972, U.S.–U.K., art. V(1)(a), 28 U.S.T. 227 (*non bis in idem* clause, the treaty equivalent to double jeopardy).

101. Again, however, prosecution by the offender’s home state fairly closely approximates the deterrent effect achieved by prosecution by the victim’s home state, whereas prosecution by the victim’s home state will not serve the (admittedly attenuated) interest of the offender’s home state in demonstrating that it will control the conduct of its nationals abroad in the future.

102. Fairness to the defendant is discussed *infra* part III.B.

This rationale for favoring the offender's home state would weaken considerably if a particular defendant expressed preference for trial in the victim's home state. Even then, however, the international community would likely still favor the offender's home state, presumably for the same reasons that extradition treaties permit states to deny extradition of their nationals regardless of the defendant's preferences. There is some sense, particularly among civil-law states, that a state should have the paramount right to decide when to deprive its own citizens of liberty, and that this right transcends even the right of states to enforce violations of law within their own territory.<sup>103</sup>

In sum, the exercise of passive personality jurisdiction might reasonably be accorded a lower priority than the exercise either of territorial jurisdiction by the state in which the crime occurred or the exercise of nationality jurisdiction by the offender's home state.<sup>104</sup> But if neither the state in which the crime occurred nor the offender's home state prosecutes, they should not have reason to complain if the victim's home state then decides to prosecute. Such a scheme of priorities would obviously depend on some reliable means of ensuring that the victim's state does not undertake a prosecution before the state in which the crime occurred or the offender's home state have made their intentions clear. But those two states can presumably communicate their intention to the foreign ministry of the victim's home state or, in an extreme case in which their intentions are ignored, directly to the court before which the defendant is to be tried. In principle, however, there is no reasonable basis for a state that does not plan to prosecute an offender to object to another state's exercise of passive personality jurisdiction over that offender. Such an exercise of jurisdiction does not "intrude" on any state's sovereignty because it would not conflict with any state's exercise of sovereign powers. On the contrary, the exercise of jurisdiction in such circumstances ensures prosecution of a crime that would otherwise go unpunished. Surely the international community as a whole has an interest in prosecuting such crimes.

Thus, passive personality jurisdiction will not "intrude" unduly on foreign sovereignty if it is exercised only when the state in which the crime occurred considers the conduct in question criminal but does not prosecute. If limited in this way, passive personality jurisdiction seems no more intrusive than nationality jurisdiction and other accepted forms of jurisdiction. But it is possible that passive personality jurisdiction unfairly

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103. See INTERNATIONAL LAWS: CASES AND MATERIALS, *supra* note 95; BEDI, *supra* note 95 (both noting that civil-law states prefer to prosecute rather than extradite their own nationals).

104. See 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 29 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) (arguing that passive personality should be a "residuary" basis for jurisdiction).

punishes defendants who are unaware of the law of the victim's home state. This issue will be discussed next.

### *B. Fairness to the Defendant*

More than one hundred years ago, the United States Department of State expressed opposition to passive personality jurisdiction on the grounds that it would be unfair to criminal defendants. It would subject individuals "not merely to a dual, but to an indefinite responsibility"—a responsibility to obey foreign laws as well as United States laws.<sup>105</sup> The State Department apparently still adheres to this view,<sup>106</sup> as do some commentators.<sup>107</sup> If passive personality jurisdiction becomes the law, it is argued, then an individual who never leaves her home town will nonetheless be exposed to the criminal laws of other states every time he or she encounters a foreigner, since the foreigner's home state can punish what it defines as crimes against that foreigner. It is unfair, the argument runs, to presume that an individual knows the law of every foreign state in the world. In this view, it may also be unfair to presume that the individual knows the nationality of the potential victim. If the United States prosecuted an Italian for a transgression against an American in Rome that was criminal in the United States but lawful in Italy, the Italian could well argue that she had no fair notice that her conduct was criminal.

In reality, it is unusual for conduct to be lawful in one state but criminal in another. Extradition treaties themselves are premised on the notion that different legal systems punish largely the same array of conduct as criminal. Still, some states' laws go further than others. The United States has laws on narcotics, money-laundering, racketeering, environmental crimes, and terrorism that are not found in other legal systems.<sup>108</sup> United States rape laws may be broader than their equivalents in other countries. Similarly, other states may have criminal laws that are alien to the United States system, such as laws prohibiting certain speech or religious practice. Even if two states both treat certain conduct as criminal, they may punish it in radically different ways. Thus the slaughter of a neighbor's cow in New Hampshire may carry less punishment than a similar act in New Delhi.

Nonetheless, these different standards of crime and punishment have not prevented states from making most serious crimes subject to

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105. *Report on the Cutting Case*, *supra* note 6, at 840.

106. See Letter of Janet G. Mullins, *supra* note 6 (criticizing passive personality jurisdiction).

107. See, e.g., Lowenfeld, *supra* note 54, at 892-93; Cowen, *supra* note 36, at 139-44.

108. See 2 M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW* 412 (1986).

extradition. Most extradition treaties, particularly the older ones, list those crimes for which extradition will be granted; usually the list consists of violent crimes such as murder, rape, robbery, assault, and kidnapping, as well as crimes against property such as theft, fraud, and embezzlement.<sup>109</sup> Such treaties no doubt reflected each party's research into the other's criminal law, and a conclusion that the quantum of punishment the other party assigned to each crime was acceptable. More recent extradition treaties sometimes oblige the parties to extradite for any felony—that is, any offense punishable in both countries by more than a year's imprisonment.<sup>110</sup> These treaties thus combine a requirement of “dual criminality”—that the crime be punishable in both states—with a requirement of a minimum level of punishment. In this way states can ensure that they do not participate in a prosecution resulting in punishment that seems disproportionately harsh or lenient.

The same principles could be applied to passive personality jurisdiction. States could agree, by treaty or custom, to prosecute crimes against their own nationals only if the crime was punishable by at least a year's imprisonment in the state in which the crime took place. An individual could therefore be prosecuted only for conduct already criminal in the state in which it occurs. Such an individual could not complain of a lack of notice that the conduct was criminal.

Common sense would also suggest that passive personality jurisdiction be limited to serious crimes punishable by significant jail terms in both states—perhaps crimes of violence such as murder, rape, and felonious assault. Such a rule would minimize the possibility that a defendant would be punished severely in the victim's home state for conduct that is a minor infraction at home.

In addition, states could agree not to exercise passive personality jurisdiction if the offender was prosecuted by either the state in which the crime occurred or the offender's home state. This rule, of course, already has an analog in domestic double-jeopardy provisions and in the *non bis in idem* provisions of extradition treaties, which may bar extradition if the fugitive has already been prosecuted by any state for the same offense.<sup>111</sup> A separate question is whether this *non bis in idem* doctrine should apply when the state in which the crime occurred and the offender's home state both exercise their prosecutorial discretion not to institute criminal

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109. See, e.g., Treaty of Extradition, April 18, 1911, U.S.-El Sal., art. II, 7 Bevans 507, 508; Convention Relating to Extradition, Aug. 11, 1874, U.S.-Ottoman Empire, art. II, 10 Bevans 642, 643 (still in force between the United States and Egypt); Convention of Extradition, Dec. 10, 1962, U.S.-Israel, art. II, 14 U.S.T. 1707, 1708.

110. See, e.g., Extradition Treaty, Oct. 13, 1983, U.S.-Italy, art. II, T.I.A.S. No. 10,837, at 5.

111. See, e.g., Treaty of Extradition, June 8, 1972, U.S.-U.K., art. V(1)(a), 28 U.S.T. 227, 230.



proceedings. Under traditional double-jeopardy and *non bis in idem* doctrine, such a decision would not bar prosecution by another sovereign.<sup>112</sup> In practice, this means a state may need to acquiesce in a prosecution it would not have brought itself. Such acquiescence might be particularly uncomfortable if the defendant were a national of the state foregoing prosecution, or if there seemed to be little evidence to support a prosecution.

This problem is not unique to passive personality jurisdiction; it inheres in all forms of concurrent jurisdiction. There are several means a state can utilize to prevent an extraterritorial prosecution of which it disapproves. First, if the offender is within its territory, it can decline to extradite for lack of evidence, or because the extradition request is for a "political offense," or perhaps because the offender is a national of the requested state.<sup>113</sup> Second, it can decline to provide judicial assistance for the foreign prosecution on many of the same grounds.<sup>114</sup> Third, it can bring to bear political and economic pressure on the offending state.<sup>115</sup> Finally, if the foreign prosecution violates the accused's human rights, any state can resort to the remedies available under international human rights law.<sup>116</sup>

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112. See *id.* (*non bis in idem* clause applicable only to previous "acquittal or conviction," not to prosecutorial decisions not to prosecute).

113. See, e.g., *id.* art. IV (state may deny extradition absent assurances from requesting state that death penalty will not apply); *id.* art. V(c)(i), as amended by Supplementary Treaty of Extradition, June 25, 1985, U.S.-U.K., art. I, S. EXEC. DOC. 17, 99th Cong. 2d Sess. 15 (political offense).

114. See, e.g., Treaty with the United Kingdom Concerning the Grand Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K., art. 3(2)(b), in S. TREATY DOC. NO. 8, 100th Cong., 1st Sess. 2 (1987) (providing no obligation to assist when request relates to political offense); *id.* art. 3(1)(b) (providing obligation only for crimes punishable by more than one year's imprisonment).

115. This pressure may even include resort to the United Nations Security Council, which has recently taken an interest in Libya's refusal to extradite two men implicated in the bombing of Pan Am flight 103 over Lockerbie, Scotland in 1989. See U.N.S.C. Res. 731, 3033d mtg., U.N. Doc. S/Res. 731 (1992), reprinted in Paul Lewis, *Libya Unyielding Despite U.N. Demand*, N.Y. TIMES, Jan. 22, 1992, at A8 (obliging Libya to "respond fully and effectively" to extradition requests of United States and United Kingdom).

116. A state can, for example, file suit to enjoin such a prosecution in the International Court of Justice or in regional human rights tribunals such as the European Court of Human Rights. See, e.g., *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989) reprinted in 11 Eur. H.R. Rep. 439 (1989) (enjoining extradition of fugitive from the United Kingdom to the United States because his human rights would be violated on death row in a Virginia prison). Alternatively, a state can bring the matter to the attention of United Nations or regional human rights authorities. Other remedies include economic sanctions and perhaps, in extreme situations, humanitarian intervention. See generally RESTATEMENT, *supra* note 1, § 703 comments & reporters' notes (describing remedies for human rights violations).

At bottom, fear of corrupt foreign prosecutions is probably what motivates much hostility toward passive personality jurisdiction, though states are too polite to say so to one another. Certainly it is a legitimate concern. Still, the international community has already acquiesced in other forms of extraterritorial jurisdiction that pose just as much a risk of abuse. Any state can declare that conduct violates "universal" norms, that it implicates the state's "national security," or that the conduct has "effects" within the state's territory, and therefore apply the protective principle of jurisdiction. Such a state does not need to rely on passive personality jurisdiction to violate the human rights of foreigners; plenty of other jurisdictional pretexts already exist. Recognizing passive personality jurisdiction will not make it appreciably easier for states to violate the human rights of foreign nationals because they can do so already. The real problem with trumped-up prosecutions is not how jurisdiction is defined; it is that the prosecution itself violates the accused's human rights. Such prosecutions are already prohibited by international human rights law.<sup>117</sup> Denial of extradition and judicial assistance to such states, together with political and economic sanctions, may prevent prosecutions of this ilk; manipulating otherwise valid bases for jurisdiction will not.

In sum, passive personality jurisdiction can be fair to the defendant, but only if applied to defendants who have reason to know their conduct constitutes a serious crime in the victim's state. For this reason, passive personality jurisdiction should be limited to serious crimes punishable by significant jail terms in both the victim's and the defendant's states. Such a rule would put the defendant on notice, minimize the possibility of disproportionate punishment, and ensure that serious offenders do not evade prosecution altogether.

The next part considers whether passive personality jurisdiction is inherently impractical.

### *C. Evidentiary and Logistical Objections to Passive Personality Jurisdiction*

A third criticism of passive personality jurisdiction is that it will not work. This objection has a number of components. First, a state seeking to exercise such jurisdiction might not be able to obtain custody of the defendant because extradition treaties often do not extend to prosecutions

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117. See International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 9-10, 999 U.N.T.S. 171.

by the victim's home state.<sup>118</sup> Second, if an otherwise uninterested state is faced with competing extradition requests from three states seeking to exercise territorial, nationality, and passive personality jurisdiction respectively, the requested state will usually give preference to the states asserting territorial and nationality jurisdiction.<sup>119</sup> Finally, even if the victim's home state can circumvent extradition problems, it will still face evidentiary obstacles such as the attendance of witnesses from abroad.<sup>120</sup>

None of these objections is fatal. The first, relating to the applicability of extradition treaties, is hardly insurmountable. True, a number of extradition treaties apply only to crimes committed within the "jurisdiction" of the requesting state,<sup>121</sup> a term that has been interpreted to include widely accepted forms of jurisdiction, such as territorial jurisdiction, but not necessarily more exotic forms.<sup>122</sup> But the use of the term "jurisdiction" rather than "territory" suggests a broader possible reading. In any event, if passive personality jurisdiction gained wider acceptance, presumably the understanding of the term "jurisdiction" might expand as well. Treaty law permits parties to interpret a treaty by taking into account any subsequent agreement between the parties on its interpretation or application, as well as any subsequent practice under the treaty that reflects the parties' agreement on its application.<sup>123</sup> Presumably the parties could also take into account a change in the customary international law of passive personality jurisdiction.<sup>124</sup> Moreover, many bilateral extradition treaties oblige the requested state to extradite for crimes committed outside

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118. See, e.g., Cowen, *supra* note 36, at 143-44 (arguing that antiterrorism statutes founded on passive personality jurisdiction will encounter extradition problems); cf. Blakesley, *supra* note 43, at 739, 744-45 (arguing that the dual criminality requirement in extradition extends to jurisdiction).

119. See Treaty of Extradition, June 8, 1972, U.S.-U.K., art. X, 28 U.S.T. 227 (providing that the requested state should consider the nationality of the accused and other factors, but not the nationality of the victim).

120. See Watson, *supra* note 1, at 70-76 (describing the evidentiary problems that arise in any extraterritorial prosecution).

121. See, e.g., Treaty on Extradition, Jan. 6, 1909, U.S.-France, 37 Stat. 1526.

122. See, e.g., 6 Whiteman, *DIGEST* § 20, at 889-99 (1968) (citing examples). See generally Blakesley, *supra* note 43, at 743-53, 754-60 (describing "special use" of the dual criminality doctrine that extends to jurisdiction); *In re Stupp*, 23 F. Cas. 281, 283 (C.C.S.D. N.Y. 1873) (No. 13,562) (applying the double criminality rule to jurisdiction).

123. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(a)-(b), 1155 U.N.T.S. 331, (entered into force Jan. 27, 1980).

The United States is not party to the Vienna Convention on the Law of Treaties but regards it as customary international law. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 78 (1991); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281 (1988).

124. See Vienna Convention, *supra* note 123, art. 31(3)(c) (providing that the parties shall also take into account relevant rules of international law).

the territory of the requesting state if the law of the requested state would permit prosecution in reciprocal circumstances.<sup>125</sup> Such treaties obviously permit the parties to define for themselves which bases for jurisdiction are acceptable. If need be, states can amend existing extradition treaties to broaden their applicability,<sup>126</sup> or, more likely, they can amend their domestic implementing legislation to permit extradition to states exercising passive personality jurisdiction.<sup>127</sup> In short, the "jurisdiction" provisions of bilateral extradition treaties do not present an insuperable obstacle to the exercise of passive personality jurisdiction.

The second "practical" concern is that, given a choice, states will extradite to states asserting territorial or nationality jurisdiction rather than to a state asserting passive personality jurisdiction. Many bilateral extradition treaties contain a clause providing guidance on how to choose among competing extradition requests. Typically this "competing requests" clause provides that the requested state should consider the place in which the crime occurred and the nationality of the offender—the bases for territorial and nationality jurisdiction, respectively—but does not mention the nationality of the victim.<sup>128</sup> It could be argued that this omission suggests that the victim's home state can never resort to extradition.

Such an interpretation would go too far. A "competing requests" clause certainly does suggest a hierarchy among extradition requests—typically, the state asserting territorial jurisdiction has the strongest claim to extradition, and perhaps that the state asserting nationality

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125. See 6 Whiteman, *supra* note 122, § 20, at 891 (citing examples).

126. States sometimes do so with a supplementary bilateral extradition treaty. See, e.g., Supplementary Treaty Concerning Extradition, June 25, 1985, U.S.-U.K., 24 I.L.M. 1105. Increasingly, however, states are relying on multilateral treaties to amend their bilateral extradition treaties. See, e.g., Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 8(1), 24 U.S.T. 565, 571, 974 U.N.T.S. 177 (providing that certain terrorist offenses "shall be deemed to be included as extraditable offenses in any extradition treaty existing between Contracting States").

127. The United States, for example, has recently amended its extradition statute to permit extradition of United States nationals even when the applicable extradition treaty does not clearly authorize extradition of nationals. See 18 U.S.C. § 3196 (West Supp. 1991) (permitting the United States to extradite nationals even if "the applicable treaty or convention does not obligate the United States to extradite its citizens"). This provision apparently responds to *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936), which held that the Constitution does not permit extradition of United States nationals pursuant to discretionary treaty language, but implied that obligatory language in a treaty or statute would suffice.

128. See, e.g., Treaty of Extradition, June 8, 1972, U.S.-U.K., art. X, 28 U.S.T. 227, 232 (providing that the requested state should consider the nationality of the accused and other factors, but not the nationality of the victim).

jurisdiction is next in line.<sup>129</sup> But these "competing requests" clauses do not bar extradition to a state asserting passive personality jurisdiction when it is the only state seeking extradition—that is, when there are *no* competing requests. In such circumstances the relevant provision is instead the "jurisdiction" provision discussed above,<sup>130</sup> which limits extradition to cases within the "jurisdiction" of the requesting state.

When there are competing requests, the typical "competing request" clause does imply that the requested state should pick the states claiming territorial and perhaps nationality jurisdiction over the state claiming passive personality jurisdiction. Such a result is generally welcome. It conforms with this Article's proposal that passive personality jurisdiction be treated as a residual form of jurisdiction, to be exercised only if no state claims territorial or nationality jurisdiction.<sup>131</sup> The states claiming more conventional forms of jurisdiction usually have a strong interest in prosecution, and the state claiming territorial jurisdiction will undoubtedly be in the best position to gather witnesses and evidence.

Nevertheless, "competing requests" clauses do not absolutely forbid a requested state to choose to extradite to a state asserting passive personality jurisdiction rather than a state asserting territorial or nationality jurisdiction. Instead, the typical clause provides that the requested state "may" take into account factors such as the place of the offense and the nationality of the offender.<sup>132</sup> Although a requested state would normally extradite to the state asserting territorial or perhaps nationality jurisdiction, on occasion the requested state might have good reason to prefer the state asserting passive personality jurisdiction—for example, if the other states did not evince a sincere desire to prosecute, or if they intended to violate the offender's human rights.

Extradition treaties, then, will not always stand in the way of a prosecution founded on passive personality jurisdiction. In some cases, of course, the victim's home state can obtain custody of the fugitive without

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129. Some "competing requests" clauses even seem to ignore nationality jurisdiction. See, e.g., Treaty of Extradition, Dec. 3, 1971, U.S.-Can., art. 13(2), 27 U.S.T. 983, 993 (mentioning place in which the offense occurred, seriousness of offense, and dates of competing requests, but not nationality of offender or victim). Still others simply provide that the requested state "shall decide" among the competing requests. See, e.g., Treaty of Extradition, May 4, 1978, U.S.-Mex., art. 16, 31 U.S.T. 5059, 5070.

130. See *supra* notes 121-27 and accompanying text.

131. See *supra* part III.A (describing proposed hierarchy of jurisdiction).

132. See, e.g., Treaty of Extradition, Dec. 3, 1971, U.S.-Can., art. 13(2), 27 U.S.T. 983, 993; Treaty of Extradition, June 8, 1972, U.S.-U.K., art. X, 28 U.S.T. 227, 232 (requested state shall make its decision "having regard" to "all the circumstances," "including" place of the offense, nationality of the person, and "provisions in this regard" of the extradition treaty with requesting state).

resort to extradition at all. The fugitive may, for example, be foolish enough to travel to the victim's home state. Or the fugitive may take refuge in a state that is willing to deport him or her to the victim's home state. Some states, moreover, are notoriously adept at circumventing extradition treaties by kidnapping fugitives—an odious practice that has been consistently tolerated by United States courts.<sup>133</sup>

The last practical objection to passive personality jurisdiction relates to the gathering of evidence. Even if the victim's home state can obtain custody of the fugitive, that state may have trouble gathering witnesses and evidence, since they will mostly be located in the state in which the crime occurred. This logistical objection, as much as anything, explains the longstanding primacy of territorial jurisdiction.<sup>134</sup>

Nonetheless, this objection applies to any form of extraterritorial jurisdiction, not just passive personality jurisdiction, and yet states routinely exercise these types of jurisdiction.<sup>135</sup> Existing mechanisms for sharing of evidence seem no less well-suited for passive personality jurisdiction than for other theories of extraterritorial jurisdiction. Letters rogatory, for example, can be used to request evidence from abroad in support of any "proceeding" in the United States, regardless of the jurisdictional basis of that proceeding.<sup>136</sup> Also, Mutual Legal Assistance Treaties, or MLATs, oblige states to provide legal assistance for criminal prosecutions regardless of the jurisdictional basis for the proceeding in the requesting state.<sup>137</sup>

In sum, nothing about passive personality jurisdiction makes it inherently impractical. States can extradite to the victim's home state if they wish, and they can help by gathering evidence to support prosecutions based on passive personality jurisdiction.

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133. See *Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886). Professor Lowenfeld has argued persuasively that the United States courts should re-examine their traditional indulgence of state-sponsored kidnapping. See generally Andreas F. Lowenfeld, *Still More on Kidnapping*, 85 AM. J. INT'L L. 655 (1991); Andreas F. Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AM. J. INT'L L. 444 (1990). The Supreme Court had the opportunity to do so last Term. See *United States v. Alvarez-Machain*, 946 F.2d 1466 (9th Cir. 1991) (holding that kidnapping of doctor from Mexico violated applicable extradition treaty). The Supreme Court, however, chose to reverse the lower court's decision and uphold the abduction as a valid exercise of authority by the Executive Branch. *United States v. Alvarez-Machain*, 112 S. Ct. 2188 (1992).

134. See *Watson*, *supra* note 1, at 54.

135. See *id.* at 41 & n.1.

136. See 28 U.S.C. § 1782 (1988).

137. See, e.g., Treaty with the United Kingdom Concerning the Grand Cayman Islands Relating to Mutual Legal Assistance in Criminal Matters, July 9, 1986, U.S.-U.K., arts. 1 & 3, in S. TREATY DOC. NO. 8, 100th Cong., 1st Sess. 1-2 (1987) (defining scope of assistance without reference to jurisdiction). Indeed, some recent MLATs do not even require dual criminality. See sources cited *supra* note 87.

It seems, then, that international law could recognize at least a limited form of passive personality jurisdiction over serious non-terrorist crimes. The next part considers whether United States constitutional law permits the establishment of passive personality jurisdiction by the United States Congress, and, if so, how such jurisdiction should be implemented.

#### IV. PASSIVE PERSONALITY JURISDICTION IN UNITED STATES LAW

##### A. *Passive Personality Jurisdiction and the Constitution*

The Constitution authorizes Congress to exercise most of the five<sup>138</sup> internationally-recognized forms of extraterritorial criminal jurisdiction.<sup>139</sup> The power to "define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations"<sup>140</sup> permits Congress to establish "universal jurisdiction" over certain offenses on the high seas, as well as some universally condemned crimes such as genocide, regardless of where they occur.<sup>141</sup> The power to regulate foreign commerce<sup>142</sup> probably justifies most forms of "territorial-effects" jurisdiction, such as violation of antitrust laws.<sup>143</sup> The unenumerated "foreign affairs power"—that is, the power to legislate in some areas affecting foreign relations—probably justifies the exercise of "protective jurisdiction," or extraterritorial jurisdiction over espionage and other crimes that affect the security of the United States.<sup>144</sup> Similarly, the foreign affairs power probably permits Congress to exercise extraterritorial jurisdiction solely on the basis of the nationality of the offender, either on the theory that such jurisdiction is "inherent in sovereignty" or that the misconduct of Americans abroad can affect United States foreign policy.<sup>145</sup> The foreign commerce power might also support such jurisdiction.<sup>146</sup>

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138. See *supra* note 5 and accompanying text.

139. See Donnelly, *supra* note 56, at 611 (citing *United States v. Smith*, 680 F.2d 255 (1st Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983)).

140. U.S. CONST. art. I, § 8, cl. 10.

141. See Donnelly, *supra* note 56, at 606-08 (arguing that the Offenses clause extends to terrorism).

142. U.S. CONST. art. I, § 8, cl. 3.

143. See BROWNLEE, *supra* note 5, at 300-02 (discussing the scope of "territorial-effects" jurisdiction in the context of the "Lotus" case).

144. Congress has an unenumerated "power to deal with foreign affairs," *Perez v. Brownell*, 356 U.S. 44, 59 (1958), and has used it frequently. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 74-76 (1972) (describing applications of the foreign affairs power).

145. See Watson, *supra* note 1, at 68-69.

146. See *id.* at 65-66.

It is somewhat more difficult, however, to find a constitutional basis for the establishment of passive personality jurisdiction—that is, jurisdiction over common crimes against Americans abroad. Professor Lowenfeld believes that passive personality jurisdiction may be justified if exercised “in implementation of an international convention widely adhered to, but probably not otherwise.”<sup>147</sup> Congress, on the other hand, appears to believe it can establish passive personality jurisdiction over terrorist and non-terrorist crimes. As evidence of this, it has adopted several anti-terrorism statutes founded at least partly on passive personality jurisdiction, though it prefers to call this legislation an exercise of protective jurisdiction.<sup>148</sup> It has also seriously considered legislation to establish jurisdiction over simple murders committed against Americans overseas.<sup>149</sup>

Unlike nationality jurisdiction, passive personality jurisdiction cannot easily be said to be “inherent” in sovereignty. Nationality jurisdiction is universally accepted in the international community; passive personality jurisdiction is not.<sup>150</sup> Indeed, the United States itself has repeatedly criticized passive personality jurisdiction.<sup>151</sup>

Nevertheless, the unenumerated foreign affairs power probably authorizes Congress to establish passive personality jurisdiction. Just as crimes *by* Americans overseas might sometimes annoy foreign states and thereby irritate their relations with the United States,<sup>152</sup> crimes *against* Americans overseas might themselves injure relations with the United States, particularly if such crimes are not prosecuted by the state in which they occur.

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147. Lowenfeld, *supra* note 54, at 893.

148. See 18 U.S.C. § 1203 (1988) (prohibiting the taking of United States hostages abroad); 18 U.S.C. § 2331 (1988) (terrorist crimes against Americans); 132 CONG. REC. S1382–87 (daily ed. Feb. 19, 1986) (remarks of Sen. Specter) (describing the bill as an exercise of protective jurisdiction, not passive personality jurisdiction).

A number of commentators agree that Congress has the power to establish passive personality jurisdiction, but they do not always point to a specific constitutional source for this authority. See, e.g., Cowen, *supra* note 36, at 140; Donnelly, *supra* note 56, at 611–13.

149. See S. 1241, 101st Cong., 1st Sess., § 3202 (passed the Senate on July 11, 1991), 137 CONG. REC. S10,018–19 (daily ed. July 15, 1991).

150. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 cmt. g.

151. See, e.g., Letter of Janet G. Mullins, *supra* note 6 (criticizing passive personality jurisdiction); *Report on the Cutting Case*, *supra* note 6 (also criticizing passive personality jurisdiction).

152. See Stephen B. Swigert, Note, *Extraterritorial Reach of Proposed Federal Criminal Code*, 13 HARV. INT'L L.J. 346, 362 (1972) (arguing that nationality jurisdiction can protect a state's foreign policy, since it allows a state to prosecute its nationals for crimes committed abroad that might otherwise go unpunished).



To be sure, the foreign affairs power seems more relevant to crimes by Americans than crimes against Americans. In the former situation, an act by an American national might harm American foreign policy by annoying a foreign state and diminishing the reputation of the United States in foreign eyes. Use of the foreign affairs power to prosecute such an act could be seen as a tool of foreign policy, designed to close a rift in relations caused by an American actor, particularly if the foreign state is willing but unable to prosecute.<sup>153</sup> By contrast, a common crime by a foreign national against an American might anger the United States, but would not itself diminish the reputation of the United States abroad. The United States would seek to prosecute the foreign defendant in such a case not to mend relations with the foreign state, but instead to protect its own nationals abroad by deterring similar crimes against Americans in the future. Indeed, an American prosecution in such a case might actually irritate relations with the foreign state, whether or not it intended to prosecute.

Nonetheless, the foreign affairs power is probably an appropriate basis for the establishment and exercise of jurisdiction over foreigners for common crimes against Americans. A crime against an American overseas has at least some relation to United States foreign affairs. If nothing else, it may require an American diplomatic or consular mission to provide consular services to the victim, thereby expending resources of the American foreign policy apparatus. More to the point, the United States and most other countries routinely view certain harms to their nationals as relevant to foreign policy. If a foreign corporation bilks a United States national, the United States government will sometimes intercede on his behalf. If a foreign state's courts refuse to seriously entertain a United States national's tort claim, the United States government may help him espouse it. Injuries to a state's nationals are important to policy-makers, especially if they must answer to voters in democratic elections. If Congress has a power to legislate on foreign affairs, surely this power includes the ability to protect United States nationals from harm while abroad.

None of the other constitutional bases for extraterritorial jurisdiction appears to authorize the establishment of passive personality jurisdiction over common crimes against Americans. The power to define and punish crimes on the high seas probably would extend to crimes against Americans on the high seas, even if they take place on foreign-flag vessels, but

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153. The foreign state might be unable to prosecute an American offender for a variety of reasons. The offender might be a diplomat, entitled to diplomatic immunity; or the offender might flee to the United States and successfully defend against extradition on the grounds of her United States nationality; or an extradition treaty may not be in force. See Watson, *supra* note 1, at 42-43, 55-56.

obviously would not apply to crimes on foreign soil or in foreign territorial waters. The power to define and punish crimes against the "Law of Nations" extends only to war crimes, genocide, and other especially serious crimes, not to simple murder, assault, and similar common crimes.<sup>154</sup> And the power to regulate foreign commerce—designed to authorize Congress to regulate foreign trade and other economic intercourse—is only distantly related to regulation of crimes by foreigners against Americans on foreign soil.

If Congress can establish jurisdiction over common crimes against Americans abroad, it almost certainly can establish jurisdiction over terrorist crimes against Americans as well. In terrorism cases, the exercise of passive personality jurisdiction flows naturally from the foreign affairs power. A terrorist crime against an American abroad affects United States security interests in a way that a common crime does not. A terrorist crime, after all, is designed to coerce a state to undertake certain behavior; it has explicitly political motives, and is directed more at the state than the individual. Punishment of such a crime clearly serves the foreign relations of the United States.

The congressional power to define and punish offenses against the law of nations may also justify congressional efforts to establish jurisdiction over terrorist crimes against Americans abroad.<sup>155</sup> This justification rings more of the universal principle than the passive personality principle because it bases jurisdiction on the nature of the act itself, not the status of the victim.<sup>156</sup> It is not entirely clear, however, that terrorism is an "Offense against the Law of Nations." The Third Restatement of Foreign Relations Law provides that a state may exercise universal jurisdiction over piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, "and perhaps certain acts of terrorism."<sup>157</sup> Nonetheless, the international community has established a series of strongly-worded multilateral conventions defining and authorizing punishment of terrorist crimes.<sup>158</sup> Some of these conventions proceed from the premise that terrorist crimes

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154. See Randall, *supra* note 5, at 839. See discussion *supra* part IV.A to determine whether that power might extend to terrorist offenses.

155. See U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations").

156. Jurisdiction over terrorists can also be described as an exercise of protective jurisdiction, designed to protect the security of the state as much as the lives of individual nationals of that state. In this sense its use resembles an exercise of the unenumerated congressional power to legislate in foreign affairs. See HENKIN, *supra* note 144, at 74-76 ("No one knows the reaches of the Foreign Affairs Power of Congress.").

157. See RESTATEMENT, *supra* note 1, § 404; see also Randall, *supra* note 5, at 838-39.

158. See generally RESTATEMENT, *supra* note 1, § 404 reporters' note 1 (citing terrorism conventions).

may be of universal concern, regardless of the nationality of the victims, because they threaten the orderly conduct of foreign relations generally.<sup>159</sup> These conventions may well have established that terrorist crimes are "Offences against the Law of Nations" within the meaning of the Constitution.<sup>160</sup>

It does appear, in sum, that the Constitution permits the Congress to establish jurisdiction over terrorist and serious non-terrorist crimes by foreigners against Americans abroad. Although regulation of terrorism against Americans may be more clearly related to the foreign affairs power than regulation of common crimes against Americans, both serve to protect United States nationals from harm abroad—a central mission of foreign policy, and therefore an acceptable application of the congressional power to legislate on foreign policy. Finally, the congressional power to define and punish offenses against the law of nations may provide an additional justification for establishing jurisdiction over terrorists.

The next part considers whether there is a need for passive personality jurisdiction, and, if so, how the jurisdiction should be implemented.

#### *B. Implementation of Passive Personality Jurisdiction*

The conclusion that Congress has the power to establish passive personality jurisdiction does not, of course, imply that it would be wise to do so. A threshold question is whether there is a real need for passive-personality jurisdiction. Most serious crimes against Americans abroad already can be prosecuted by the state in which the crime occurs. In those unusual cases in which the host state declines to prosecute, the United States or some other state often can prosecute using some theory of jurisdiction other than the passive personality principle. The offender's home state, for example, may be able to proceed on the basis of nationality jurisdiction. Also, the United States itself can exercise universal or protective jurisdiction over terrorist offenses against its nationals, and it can exercise nationality jurisdiction over common crimes of violence committed by Americans against other Americans abroad.

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159. See, e.g., Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 567, 974 U.N.T.S. 177.

160. See Donnelly, *supra* note 56, at 606-08 (arguing that the Offenses clause applies to terrorist offenses).

Admittedly, there is probably a greater need for a statute on crimes *by* Americans abroad rather than crimes *against* Americans abroad.<sup>161</sup> Every year United States nationals commit crimes abroad that go unpunished. Sometimes this is so because of defects in extradition: there are dozens of states, including allies like the Philippines, Saudi Arabia, Morocco, and Korea, with which the United States has no extradition treaty.<sup>162</sup> Sometimes United States nationals go unpunished because the offender is a civilian dependent of a member of the United States military, and the host state expects the United States to prosecute when in fact a United States courts-martial cannot constitutionally do so and United States civilian courts lack nationality-based jurisdiction to do so.<sup>163</sup>

Still, if a non-American commits a common crime of violence against an American overseas and the state in which the crime occurs cannot or will not prosecute, a United States prosecution based on passive personality may be the only alternative to no prosecution whatsoever. In such a case, as we have seen,<sup>164</sup> neither international law nor United States constitutional law prevents Congress from establishing jurisdiction over the offender, except that international law might frown on the exercise of passive personality jurisdiction in the absence of dual criminality. Even if international law does not require dual criminality, a prudent Congress should include such a limitation in any statute establishing passive personality jurisdiction.

A prudent Congress would also limit passive personality jurisdiction to serious crimes of violence. The United States obviously lacks the resources to prosecute foreigners for every pickpocketing and petty larceny committed against United States nationals abroad. Extradition would be unavailable for misdemeanors anyway, since extradition treaties apply only to felonies. Finally, Congress should authorize passive personality jurisdiction only in those cases in which no other government prosecutes.

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161. See generally Watson, *supra* note 1, at 54-63; Gregory A. McClelland, *The Problem of Jurisdiction Over Civilians Accompanying the Forces Overseas—Still with Us*, 117 MIL. L. REV. 153, 180 (1987); U.S. General Accounting Office, *Report to the Congress of the United States: Some Criminal Offenses Committed Overseas by DOD Civilians Are Not Being Prosecuted: Legislation is Needed* (Sept. 11, 1979).

162. See, e.g., *Oregonian Returns Home After Five Months in Korean Prison*, *supra* note 72 (reporting that the United States could not extradite a fugitive because of the lack of an extradition treaty between the United States and South Korea and could not prosecute the fugitive for lack of nationality jurisdiction).

163. See, e.g., *Military Cooperation with Civilian Law Enforcement: Hearing Before the Subcomm. on Crime of the House Judiciary Comm.*, 99th Cong., 1st Sess. 9 (1985) (statement of Rep. Bennett) (noting that in 1977 civilians on United States bases abroad committed 422 "major offenses," and that the host state declined to prosecute 136 of those cases).

164. See discussion *supra* part IV.A.

To go further would irritate foreign governments, and it would do nothing to further the real goal of passive personality jurisdiction: to ensure that *some* state prosecutes an individual suspected of a serious crime.

Congress has begun to consider legislation along these lines. In 1991 both houses of Congress passed the "Murder of United States Nationals Act of 1991,"<sup>165</sup> a bill to establish jurisdiction over foreigners who murder United States nationals on foreign soil. Such prosecutions would require the Justice Department to certify that no prosecution "has been previously undertaken by a foreign country for the same act or omission" and would also require the Attorney General, in consultation with the Secretary of State, to determine that the offender is no longer present in the state in which the crime occurred and that that country "lacks the ability to lawfully secure the person's return."<sup>166</sup> This determination would be unreviewable.<sup>167</sup> The bill would also waive the statutory requirement for an extradition treaty in those cases in which a foreign government requested the extradition of a fugitive suspected of murdering a United States national abroad.<sup>168</sup> Although Congress shelved the proposal, a part of the Omnibus Crime Bill, at the end of 1991, Congress plans to take it up again later.<sup>169</sup>

This proposed bill has a number of flaws. Most important, it criminalizes certain crimes *against* Americans abroad without also criminalizing crimes *by* Americans abroad. The legislative history of the bill suggests that it was inspired in part by the murder of one United States national by another in Korea in 1988.<sup>170</sup> Congress could have created jurisdiction over such crimes by establishing nationality jurisdiction, a much less controversial form of jurisdiction than passive personality jurisdiction. By jumping right to passive personality jurisdiction, Congress runs the risk of annoying foreign states that might have acquiesced in the establishment of nationality jurisdiction. By ignoring nationality jurisdiction, Congress

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165. S. 1241, 102d Cong., 1st Sess. §§ 3201-03 (passed the Senate July 11, 1991), *reprinted in* 137 CONG. REC. S10,018-19 (daily ed. July 15, 1991); H.R. 3371, 102d Cong., 1st Sess. § 110(a) (1991), *reprinted in* 137 CONG. REC. H11,686 (daily ed. Nov. 26, 1991) (entitled "Foreign Murder of United States Nationals").

166. S. 1241, 102d Cong., 1st Sess. § 3202(c) (1991).

167. *Id.*

168. *Id.* § 3203.

169. See *supra* notes 74-75 (citing newspaper articles on the politics of the crime bill).

170. See 137 CONG. REC. S4750-51 (daily ed. April 18, 1991) (statement of Sen. Thurmond) (introducing the bill and arguing that it would help address cases such as the murder of Carolyn Abel, a U.S. national, in Korea); *id.* at S4751-52 (statement of Sen. Hollings) (supporting Sen. Thurmond's assertion).

overlooks the significant number of serious crimes by Americans abroad that go unprosecuted every year.<sup>171</sup>

The bill's reliance on an unreviewable determination by the Justice Department is also troubling. A court, not the Justice Department, should make the findings of fact necessary to determine whether or not subject-matter jurisdiction exists—in this case, whether the foreign state lacks the ability to obtain custody of the fugitive. Instead, the bill should require the Justice Department to simply present evidence on that question, such as the absence of a relevant extradition treaty or a diplomatic note from the foreign government itself. The presentation of such evidence might establish a rebuttable presumption that the foreign state could not obtain jurisdiction. Commentators have also criticized similar provisions in the so-called Specter bill<sup>172</sup> on terrorism,<sup>173</sup> but apparently these criticisms have fallen on deaf ears.

In sum, passive personality jurisdiction is necessary to reach those cases in which a foreigner commits a common crime of violence against a United States national abroad. Although there may be a more pressing need for nationality-based jurisdiction, that form of jurisdiction obviously does not apply to crimes by aliens against Americans abroad. Passive personality, however, should be carefully limited to apply only when the conduct is criminal in the state in which it occurred, and only when that state does not prosecute. Finally, for practical reasons, the United States should establish passive personality jurisdiction only over serious crimes of violence, not more common offenses.

The next part of this Article considers whether international law would benefit from a more systemic approach to passive personality and other principles of extraterritorial jurisdiction.

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171. See Watson, *supra* note 1, at 54–60.

172. S. 1429, 99th Cong., 1st Sess. (1985) (Terrorism Prosecution Act, enacted as 18 U.S.C. § 2331 (1984)).

173. See, e.g., Lowenfeld, *supra* note 54, at 891–92.

Another provision of the passive personality bill, the waiver of the treaty requirement for extradition, also gives one pause. It permits extradition to all states, regardless of their human-rights records, and deprives fugitives of important procedural safeguards, such as the right to be tried only for the crimes for which extradition is requested. A better answer, in principle, would be simply to negotiate extradition treaties with states currently lacking extradition relations with the United States. The reality is that negotiation of such treaties takes much time and many resources. See Watson, *supra* note 1, at 55–56 (describing obstacles to negotiation of extradition treaties).

## V. RETHINKING THE JURISPRUDENCE OF JURISDICTION: A SYSTEMIC APPROACH

The proper scope of extraterritorial jurisdiction has not traditionally been defined by treaty.<sup>174</sup> Although some have attempted to codify international criminal law,<sup>175</sup> these efforts have not produced any definitive treaty or convention defining the powers of states to legislate extraterritorially or the limits of those powers. Instead, the rules on jurisdiction are said to spring from customary international law, comity among nations, or domestic "conflict of laws" principles.<sup>176</sup>

However they are labeled, the principles of extraterritorial jurisdiction clearly grow out of decentralized sources—the domestic law and practice of states—rather than a centralized source. This decentralized rule-making has inevitably generated fierce jurisdictional conflicts even between the closest of allies.<sup>177</sup> The United States, for example, has antagonized European states by asserting broad jurisdiction over foreign-incorporated subsidiaries of United States corporations.<sup>178</sup>

It is doubtful that such disputes can be avoided by treating the rules as expressions of customary international law rather than comity or conflicts principles. In the first place, it is not clear that some of the rules do qualify as customary international law. The formation of customary law

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174. See Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 675 (1986) (interpreting draft *Restatement (Third)* provisions on jurisdiction as resting on customary international law).

175. See, e.g., Draft Convention on Jurisdiction with Respect to Crime, in Harvard Research, *supra* note 4, at 435–51.

176. See RESTATEMENT, *supra* note 1, § 403 cmt. a (describing the "reasonableness" limitation on jurisdiction as a rule of international law, not comity); *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 609, 613 (9th Cir. 1976) (pointing to comity); MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 241 (1988) (noting that many countries refer to the jurisdiction rules as "conflict of laws" principles).

Nor is there agreement on the *Lotus* court's assertion that states have a "wide measure of discretion which is only limited in certain cases by prohibitive rules." The S.S. "*Lotus*" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 19 (Sept. 7), at 20. A number of commentators have criticized this view, and the International Court itself has itself pulled back from it. See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 302–03 (4th ed. 1990) (citing examples).

177. See THE EXTRATERRITORIAL APPLICATION OF NATIONAL LAWS 36–37 (Dieter Lange & Gary Born eds., 1987) ("Considerable disagreement exists over the extent to which the doctrine justifies extraterritorial application of national laws.").

178. See, e.g., European Communities: Comments on the U.S. Regulations Concerning Trade with the U.S.S.R., *reprinted in* 21 I.L.M. 891 (1982) (asserting that U.S. regulation of foreign-incorporated subsidiaries is "not in conformity with recognized principles of international law").

requires more than a repeated practice by some states. It requires a "general and consistent" state practice carried out through a sense of legal obligation, or *opinio juris*.<sup>179</sup> There is no "general and consistent" practice of exercising passive personality jurisdiction now, at least not over common crimes. Nor is there clear state practice rejecting passive personality jurisdiction: witness the number of states that have adopted the theory.<sup>180</sup> States use other principles of jurisdiction, such as territorial-effects and protective jurisdiction, in very different ways.<sup>181</sup> Even where there is agreement about a particular basis for jurisdiction, many states acquiesce in its exercise not out of a sense of obligation (*opinio juris*) but out of comity.<sup>182</sup>

In any event, treating the rules on jurisdiction as customary international law will not eliminate conflicts of jurisdiction, since customary international law is a weak form of international law. Although several defects in customary law are well documented, perhaps most important is that it is not easily discerned.<sup>183</sup> The "practice" of states may be shrouded in diplomatic mist, hidden from view by a cloud of classification and obfuscation. In this country, the public, Congress, and even many parts of the Executive Branch may never know whether the United States government repeatedly objects to or acquiesces in other governments' use of passive personality jurisdiction. The relevant material may consist of confidential diplomatic notes or classified internal memoranda.<sup>184</sup> A rule of law that cannot be found is hardly a secure basis for state action.

Customary law has other problems. Even if the practice of a state is public knowledge, that practice may conflict with other state practice. In a complex world, it seems to become more and more difficult to find examples of "general and consistent" state practice—if indeed that practice can be ascertained at all. Assuming a uniform practice has been established, it may then be difficult to change the resulting rule of customary international law without violating that rule. A paradox of customary law,

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179. See RESTATEMENT, *supra* note 1, § 102 cmt. b.

180. See, e.g., *supra* note 76 (citing various penal codes).

181. See RESTATEMENT, *supra* note 1, § 403, reporters' note 1 (noting the difficulties between states regarding the exercise of jurisdiction).

182. See JANIS, *supra* note 176, at 259.

183. See Trimble, *supra* note 174, at 729 (asserting that Congress and even much of the Executive Branch may be unaware of customary international law because "many of the acts that comprise state practice would not command attention outside [the State Department]"); cf. Note, *Concepts of Law in the Chinese Anti-Crime Campaign*, 98 HARV. L. REV. 1890, 1890 (1985) ("The chief problem for students of modern Chinese law has often been one of finding it.") (citations omitted).

184. See Trimble, *supra* note 174, at 729–31 (noting that customary international law is formed and interpreted without much public or even congressional knowledge).



in other words, is that states sometimes must violate it to change it.<sup>185</sup> Citing these and other difficulties, Professor Trimble has argued that United States courts generally do not and should not apply customary international law.<sup>186</sup>

Multilateral conventions can more easily establish a uniform set of jurisdictional rules than customary international law or other decentralized sources of authority. First, multilateral conventions provide a more accessible form of law than customary international law. In all likelihood, a convention on jurisdiction would be easier to find and use than an array of differing domestic conflict-of-laws and comity principles that, if written at all, are in different languages. Second, a multilateral convention on jurisdiction could, at least in theory, establish a single set of rules rather than a hundred different sets of rules. This unifying function has helped drive international law from custom to treaty in a wide variety of areas, including the law of human rights,<sup>187</sup> genocide,<sup>188</sup> discrimination against women,<sup>189</sup> diplomatic and consular relations,<sup>190</sup> the global environment,<sup>191</sup> and outer space.<sup>192</sup> Nonetheless, the unifying impulse has not yet reached the field of jurisdiction.

The prospects for a Convention on Jurisdiction of States are not bright, at least not now. Disagreements about jurisdiction do not confine themselves to the "working level" of national governments; they can have profound political implications. In 1984, for example, the British Secretary for Trade and Industry criticized American extraterritorial jurisdiction as "impos[ing] *your* laws on people in other countries, inside *their* own homes and *their* businesses", and said this practice was "the most persistent source of tension" between the United States and the United Kingdom.<sup>193</sup> For these reasons a multilateral convention on jurisdiction would probably be

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185. See BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* 112 n.3 (1991) (positing a situation where a state may wish to violate customary international law).

186. See Trimble, *supra* note 174, at 684-87 (arguing that United States courts rarely apply customary international law); *id.* at 707-32 (attacking customary international law as inferior to treaty law).

187. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

188. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

189. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 19 I.L.M. 33.

190. Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

191. Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541.

192. Outer Space Treaty, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

193. United Kingdom Department of Trade Press Notice 73, Feb. 8, 1984, *quoted in Extraterritorial Jurisdiction and Extradition*, 36 INT'L. & COMP. L.Q. 398, 398 (A.V. Lowe & Colin Warbrick eds., 1987) (emphasis in original).

riddled with reservations.<sup>194</sup> Still, a convention with reservations would probably be better than no convention at all.

There are few promising alternatives to negotiating a multilateral convention or retaining the current system. In recent years some law-makers and scholars have campaigned for an international criminal court to handle terrorist crimes and other offenses of international concern.<sup>195</sup> Although such a court would presumably have some power to adjudicate its own jurisdiction, and thus to apply and perhaps clarify some of the existing rules of extraterritorial jurisdiction, it would likely confine itself to universal jurisdiction, since it would be constituted to handle crimes of universal concern. Presumably it would take no interest in common crimes of violence, such as murder, as to which territorial, nationality and passive personality jurisdiction are the relevant norms. Given the opposition to an international court dedicated to universal crimes, it is unlikely that such a court's jurisdiction would extend to non-universal crimes, at least not soon after its creation. Indeed, the prospects for the creation of any such court remain very uncertain.<sup>196</sup>

Consequently, it appears that the international community will continue to rely on more decentralized sources of law—custom, comity, conflicts—to define the contours of extraterritorial criminal jurisdiction. That reality makes it all the more important that the states take into account systemic considerations when they make and apply the rules. These systemic considerations grow out of the collective interest of states in law enforcement, to which states have repeatedly dedicated themselves through treaties on crime.

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194. Not surprisingly, there is no comprehensive multilateral convention pertaining to extradition, which raises contentious political issues of its own. Nonetheless, some conventions regarding particular types of crimes, such as genocide and narcotics trafficking, contain provisions on extradition. See, e.g., Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, art. VII, 78 U.N.T.S. 277; Single Convention on Narcotic Drugs, March 30, 1961, art. 36(b), 18 U.S.T. 1407, 520 U.N.T.S. 151 as amended by the Protocol amending the Single Convention on Narcotic Drugs, March 25, 1972, art. 14, 26 U.S.T. 1439, 976 U.N.T.S. 3. The Montevideo Convention of 1933 sets forth generally applicable obligations to extradite, and the United States and a dozen other Latin American states are signatories. However, the Convention has no effect so long as bilateral extradition treaties are in force, and most American states are party to such treaties. Convention on Rights and Duties of States, Dec. 26, 1933, arts. I, VII, 165 L.N.T.S. 19, 25.

195. For more on an international criminal court, see generally BENJAMIN B. FERENCZ, 1 *AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS* (1980) (describing past efforts to establish an international criminal court and arguing that such a court would help to deter international crimes).

196. See generally Michael P. Scharf, *The Jury is Still Out on the Need for an International Criminal Court*, 1991 DUKE J. COMP. & INT'L L. 135 (expressing reservations about the proposed court).

The international community has developed elaborate multilateral treaties on virtually all forms of transnational crime, including genocide,<sup>197</sup> torture,<sup>198</sup> war crimes,<sup>199</sup> hostage-taking,<sup>200</sup> violence against internationally protected persons,<sup>201</sup> aircraft sabotage,<sup>202</sup> narcotics trafficking,<sup>203</sup> and trafficking in prostitution.<sup>204</sup> In addition, virtually all states have pledged to cooperate in suppression of crime that does not cross borders, such as murder, rape, assault, robbery, and arson, by adopting bilateral extradition treaties that cover most serious crimes. Even those states without formal extradition relations may use other means, such as deportation or expulsion, to render fugitives to a prosecuting state.<sup>205</sup> Finally, states have entered into bilateral and multilateral treaties providing for mutual legal assistance in criminal matters, such as procuring evidence and taking depositions.<sup>206</sup> Further, they have provided such assistance in the absence of treaties through letters rogatory and other forms of comity.<sup>207</sup> The international community has thus committed itself to the suppression of all forms of crime through a variety of devices. The

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197. Convention on the Prevention and Punishment of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

198. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, *as modified*, Feb. 4, 1985, 24 I.L.M. 535.

199. Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (Third Geneva Convention); Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287 (Fourth Geneva Convention) (obliging parties to criminalize and prosecute "grave breaches" of the Convention).

200. International Convention Against the Taking of Hostages, Dec. 17, 1979, 18 I.L.M. 1456.

201. Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

202. Convention for the Suppression of Unlawful Acts against Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565.

203. Single Convention on Narcotic Drugs as amended, March 30, 1961, art. 36(b), 18 U.S.T. 1407.

204. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, art. 619 I.L.M. 33, 37.

205. See generally Alona E. Evans, *Acquisition of Custody over the International Fugitive Offender-Alternatives to Extradition: A Survey of United States Practice*, 1964 BRIT. Y.B. INT'L L. 77, 82-89 (discussing exclusion, expulsion, and special arrangements as alternatives to extradition).

206. See, e.g., SENATE COMM. ON FOREIGN RELATIONS, TREATY WITH THE BAHAMAS ON MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS, S. EXEC. REP. NO. 12, 101st Cong., 1st Sess. 1-3 (1989); Treaty for Mutual Legal Assistance, Dec. 9, 1987, U.S.-Mex., 27 I.L.M. 443; European Convention on Mutual Assistance in Criminal Matters, April 20, 1959, Europ. T.S. No. 30 (entered into force June 12, 1962).

207. See, e.g., 28 U.S.C. § 1782 (1988) (authorizing United States courts to provide judicial assistance in response to letters rogatory); *United States v. Reagan*, 453 F.2d 165, 172-73 (6th Cir. 1971) (discussing United States courts' "inherent" power to use letters rogatory); cf. SENATE COMM. ON FOREIGN RELATIONS, LEGISLATIVE ACTIVITY REPORT, S. REP. NO. 30, 102d Cong., 1st Sess. 15 (1991) (questioning efficiency of letters rogatory).

international legal system, in other words, has asserted a strong interest in deterring and punishing crime.

At present, discourse over jurisdiction focuses on the question of which state has the strongest interest in the conduct or individuals in question. In *United States v. Columba-Colella*<sup>208</sup> the court rejected the United States assertion of passive personality jurisdiction over a Mexican national accused of receiving stolen goods belonging to a United States national. Because the crime was committed in Mexico, the court reasoned, the United States lacked "competence" to exercise jurisdiction, notwithstanding the harm to a United States national.<sup>209</sup> The court added in dictum that the United States would lack competence to establish jurisdiction even over a Mexican who murdered a United States national in Mexico.<sup>210</sup> The court apparently did not consider it relevant whether Mexico objected to a United States prosecution, or even whether Mexico itself planned to prosecute, noting only that the defendant would be "subject to whatever sanctions are applicable under the law of Mexico."<sup>211</sup>

Considering the facts of the case, the outcome in *Columba-Colella* is probably unobjectionable. Even a broader view of passive personality, like that suggested in this Article, might decline to exercise jurisdiction over less serious, non-violent crimes committed abroad, if only to minimize the possibility of conflict among states. The reasoning of the opinion, however, is open to question. The court offered no explanation or authority for its assertion that the United States lacks competence to prosecute a Mexican national for murder of a United States national in Mexico, except to say that "[n]o one would argue" for such a result.<sup>212</sup> The court apparently did not consider it relevant whether Mexico or the international system as a whole actually might *want* the United States to prosecute in some such cases—if, for example, the offender were present in the United States and could not be extradited for lack of an extradition treaty or some other reason. The court focused, in other words, purely on what it perceived as the remote United States interest at stake, without considering whether interests outside the United States—in Mexico, and among states as a whole—might argue for a United States prosecution.

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208. 604 F.2d 356 (5th Cir. 1979).

209. *Id.* at 360. The court offered no authority for its conclusion that the United States would lack "competence" to prosecute in such circumstances, saying only that "[n]o one would argue" that Congress could establish such jurisdiction or that courts could enforce it. *Id.*

210. *Id.*

211. *Id.* at 361.

212. *Id.* at 360. The court did not acknowledge that many foreign states have established jurisdiction in precisely those circumstances. See, e.g., sources cited *supra* note 76 (foreign penal codes). On the other hand, the court's decision predates most of the United States statutes establishing passive personality jurisdiction. See *supra* text accompanying notes 36–52.

To be sure, a focus on a state's individual interest can serve as a useful surrogate for systemic concerns—that is, for the interest of the international legal system in suppressing crime. For example, a state seeking to exercise territorial jurisdiction over a crime will likely conclude that it has a stronger claim to jurisdiction than do states seeking to exercise nationality or passive personality jurisdiction,<sup>213</sup> and the competing states will likely acquiesce in that judgment. In such a case the territorial state's interest in prosecuting coincides with the preference of the international legal system that crimes be tried in the state in which they occurred.

But the interest of an individual state may sometimes seem weaker than the interest of the system as a whole in prosecuting a particular offender. Here, reliance on an individual state's "interests" overlooks the systemic interests at stake. For example, the international community might have an interest in prosecuting crimes involving only stateless persons on the high seas or in Antarctica, even though no one state had any interest. Similarly, individual states have asserted that the state of a murder victim's nationality has no interest in prosecuting the offender, regardless of whether any other state prosecutes. Such an assertion implies that the international legal system *insists* on prosecution by the state in which the crime occurred, or perhaps by the state of the offender's nationality, even if those states cannot or will not prosecute. But the international community's commitment to law enforcement suggests that it should prefer a prosecution by some state to no prosecution at all. In such a case the victim's home state might vindicate not only its own interests but promote the systemic interests of the international legal system. The victim's home state, in other words, may serve as a kind of "private attorney general."<sup>214</sup>

This is not to suggest that every unprosecuted crime should be amenable to universal jurisdiction. Prosecutorial discretion and evidentiary constraints are part of every domestic legal system. A state seeking to exercise extraterritorial criminal jurisdiction should be required to rely on one of the five recognized bases of jurisdiction. But there may be times when the systemic interest in prosecution requires resort to the more exotic of these five bases.

The Third Restatement of the Foreign Relations Law of the United States,<sup>215</sup> adopted in 1987, has recognized this systemic interest in its much-maligned provision describing limitations on jurisdiction. Section

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213. See discussion *supra* part III.

214. Cf. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 263–71 (1975) (relating to attorneys' fees for private attorneys general).

215. RESTATEMENT, *supra* note 1.

403(2) now calls on states to determine the reasonableness of a particular exercise of jurisdiction by evaluating a number of factors, ranging from the site of the crime to the nationality of the relevant parties.<sup>216</sup> This provision, the most controversial of the entire Restatement, has been roundly criticized for adopting a rule of "international law" requiring "reasonableness" and "balancing" when international law has not gone that far.<sup>217</sup>

Whatever the merits of that dispute, a different aspect of Section 403 deserves praise. The Second Restatement asserted that the limits of jurisdiction depended entirely on the state's connection to the crime. It looked to factors like a state's "vital national interests" and the nationality of the person sought.<sup>218</sup> Section 403 cites similar factors, but it also looks beyond the four corners of the state. It asserts that jurisdiction should also turn on "the importance of the regulation to the international political, legal, or economic system" and "the extent to which the regulation is consistent with the traditions of the international system."<sup>219</sup> The Third Restatement thus envisions a more thorough inquiry than that set forth in the Second Restatement and *Columba-Colella*.<sup>220</sup>

In sum, the jurisprudence of extraterritorial jurisdiction should continue to rely on the rights of individual states, which usually approximate the interest of the international community as a whole. When, however, the choice is between the exercise of an exotic form of jurisdiction, such as passive personality jurisdiction or universal jurisdiction, and no prosecution by any state at all, decisionmakers should consider whether the international legal system has an interest in prosecution. A focus on rights of individual states will not always further that larger interest.

## VI. CONCLUSION

The passive personality principle has a shabby reputation that is largely undeserved. A number of states have established passive personality jurisdiction over common crimes, and most states recognize it as a legitimate tool in combatting terrorism. To be sure, it is prudent to approach passive personality jurisdiction with caution. Like any form of

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216. RESTATEMENT, *supra* note 1, § 403(2).

217. See, e.g., JANIS, *supra* note 176, at 258 ("The Restatement (Revised) is unsupported by precedent when it asserts that reasonableness is a limit imposed by international law.").

218. See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 40 (1965).

219. RESTATEMENT, *supra* note 1, § 403(2)(e)-(f).

220. 604 F.2d 356 (5th Cir. 1979).

extraterritorial criminal jurisdiction, it can be seen as an intrusion into the sovereignty of the state in which the conduct occurred, and can be exercised only through international cooperation in production of evidence and witnesses. As such, it should be a last-resort form of jurisdiction, a device to be held in reserve unless other interested states fail to prosecute. But it should not be dismissed altogether. Passive personality jurisdiction can help ensure that fugitives do not literally get away with murder.

The continuing controversy over passive personality jurisdiction illustrates the larger need for a multilateral convention on jurisdiction. States are relying on extraterritorial jurisdiction with increasing frequency, which will inevitably lead to more conflicts over jurisdiction. For this reason, it has become more important than ever that the international community establish some benchmarks on jurisdiction that reflect the interests of the international legal system and not just those of individual states. Disagreements over jurisdiction may make negotiation of a Convention on Jurisdiction impossible in the near term, but discussing the issues in a multilateral forum might at least promote greater understanding of different states' positions on jurisdiction. If nothing else, negotiations would be a beginning.

The international community has managed to establish multilateral conventions covering most other significant areas of international law. Meanwhile, a renewed multilateralism has rejuvenated the United Nations, resulting in international cooperation on Somalia, Iraq, and other matters. It is time to extend that cooperative spirit to jurisdiction as well.